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VOL 3272
No. 17642

In the

see also
Vol. 3273

United States Court of Appeals

For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK GREVEY, co-partners, d.b.a. DUKE CITY LUMBER COMPANY, and DUKE CITY LUMBER COMPANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT T. JENKINS and GEORGIA MAE JENKINS, general partners, and GEORGIA MAE JENKINS, Trustee for JAMES HENRY NAGEL, limited partner, d.b.a. NAGEL LUMBER & TIMBER COMPANY, a limited partnership, and NAGEL LUMBER & TIMBER COMPANY, a limited partnership,

Appellees.

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SUBJECT INDEX

	Page
Jurisdiction	2
Statement of the Case.....	3
Specification of Errors.....	6
Summary of the Argument.....	8
Argument	10
(1) The District Court Erred in Finding That the Parties Reached Any Agreement Concerning the Purchase and Operation of the Mill During Their Informal Conversation in Winslow.....	10
(2) The District Court Erred in Concluding That the Parties Made a Valid, Lawful Contract Granting Appellees the Option to Acquire from Appellants, After the Latter's Initial Purchase, an Undivided One-Half Interest in the Mill at the Same Terms Appellants Could Secure from the Prior Owners.....	15
(3) The District Court Erred in Awarding Grossly Excessive Damages	32
(4) The District Court Erred in Failing to Hold That the Proper Measure of Damages Was the Difference Between Appellees' Cost of Performance and the Market Value of One-Half the Mill	33
(5) The District Court Erred in Concluding That Appellees Were Entitled to More Than the Difference Between Cost of Performance and Market Value if They Were Awarded the Profits It Found They Might Have Earned from Ownership of One-Half the Mill.....	36
(6) The District Court Erred in Awarding Damages Without Taking Into Account the Cost of Appellees' Performance.....	41
(7) The District Court Erred in Awarding Special Damages.....	43
(8) The District Court Erred in Computing the Profits It Awarded	54
Conclusion	62
Appendix	

TABLE OF AUTHORITIES CITED

	Pages
Anvil Mining Co. v. Humble, 153 U.S. 540 (1894).....	38
Bradley v. Industrial Comm'n, 51 Ariz. 291, 76 P.2d 745 (1938)....	23
Canada Del Oro Mines, Ltd. v. Collins, 4 Ariz. 163, 36 Pac. 33 (1894)	23
Cole v. Adkins, 69 Ariz. 81, 209 P.2d 859 (1949).....	33, 46
Crag Lumber Co. v. Crofoot, 144 Cal. App. 2d 755, 301 P.2d 952 (1956)	33
Crahane v. Swan, 212 Ore. 143, 318 P.2d 942 (1957).....	33, 34
Daru v. Martin, 89 Ariz. 373, 363 P.2d 61 (1961).....	32
DeCesare v. Occhiuto, 64 N.Y.S. 2d 675 (Sup. Ct. 1946).....	34
Diamond v. Chiate, 81 Ariz. 86, 300 P.2d 583 (1956).....	20
Durham v. Dodd, 79 Ariz. 168, 285 P.2d 747 (1955).....	19
Eastwood Homes, Inc. v. Hudson, 161 Cal. App. 2d 532, 327 P. 2d 29 (1958).....	33
Hadley v. Baxendale, 9 Exch. *341.....	44, 45
Hardinger v. Till, 1 Wash. 2d 335, 96 P.2d 262 (1939).....	52, 53
Hawkinson v. Johnston, 122 F.2d 724 (8th Cir.) <i>cert. denied</i> , 314 U.S. 694 (1941).....	60, 61
Higgins v. Arizona Savings & Loan Ass'n, 90 Ariz. 55, 365 P.2d 476 (1961)	46
History Co. v. Dougherty, 3 Ariz. 387, 29 Pac. 649 (1892).....	23
Isenberg v. Lemon, 84 Ariz. 340, 327 P.2d 1916, <i>Modified</i> , 84 Ariz. 364, 329 P.2d 882 (1958).....	56
Jacob v. Miner, 67 Ariz. 109, 191 P.2d 734 (1948).....	37, 56
Joseph v. Donover Co., 261 F.2d 812 (9th Cir. 1958).....	12, 13, 14, 15, 28, 29, 30
Korrick v. Tuller, 42 Ariz. 493, 27 P.2d 529 (1933).....	27
Lane v. Mathews, 73 Ariz. 435, 242 P.2d 557, 74 Ariz. 201, 245 P.2d 1925, 75 Ariz. 121, 251 P.2d 303 (1952).....	23
Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86 (10th Cir.), <i>cert. denied</i> , 347 U.S. 976 (1954).....	42, 43

TABLE OF AUTHORITIES CITED

iii
Page

Los Angeles Shipbuilding & Drydock Corp. v. United States, 289 F. 2d 222 (9th Cir. 1961).....	28
Lowell O. West Lumber Sales v. United States, 270 F.2d 12 (9th Cir. 1959)	21
Martin v. LaFon, 55 Ariz. 196, 100 P.2d 182 (1940)....36, 37, 38, 39, 41,42, 43, 44, 45, 49, 56	
Matson v. Bradbury, 40 Ariz. 140, 10 P.2d 376 (1932).....	42
Matsuo Yoshida v. Liberty Mutual Insurance Co., 240 F.2d 824 (9th Cir. 1957).....	21
McFadden v. Shanley, 16 Ariz. 91, 141 Pac. 732 (1914).....	46
McNeil v. Attaway, 87 Ariz. 103, 348 P.2d 301 (1960).....	20
Minshall v. Case, .. Colo., 364 P.2d 868 (1961).....	33
Moore v. Smotkin, 79 Ariz. 77, 283 P.2d 1029 (1955).....	11
Palmer v. Connecticut Ry. & L. Co., 311 U.S. 544 (1941).....	33, 61
Peters v. Lines, 275 F.2d 919 (9th Cir. 1960).....10, 33, 34, 56, 58, 59	
Platts v. Arney, 50 Wash. 2d 42, 309 P.2d 372 (1957).....	34
Raffles v. Wichelhaus, 2 Hurl. & C., 159 Eng. Rep. 375 (1864).....	17
Ray v. Frye, 58 Ariz. 340, 119 P.2d 941 (1941).....14, 17, 30	
Reynolds v. United States, 158 F. Supp. 719 (Ct. Cl. 1958).....	33
Richards Development Co. v. Sligh, 89 Ariz. 100, 358 P.2d 329 (1961)	20
Rodriguez v. Secretary of the Treasury of Puerto Rico, 276 F.2d 344 (1st Cir. 1960).....	32
Romer v. Leyner, 224 Ark. 884, 277 S.W. 2d 66 (1955).....	34
Schuehle v. Schuehle, 21 Wash. 2d 609, 152 P.2d 608 (1944).....	17
Spellman Lumber Co. v. Hall Lumber Co., 73 Ariz. 322, 241 P.2d 196 (1952)	17
St. Paul & Tacoma Lumber Co. v. Fox, 26 Wash. 2d 109, 173 P.2d 194 (1946)	21, 22, 30
Susi v. Simonds, 147 Me. 189, 85 A.2d 178 (1951).....	52
Tennent v. Leary, 82 Ariz. 67, 308 P.2d 693 (1957).....	33
United States v. Hathaway, 242 F.2d 897 (9th Cir. 1957).....	21

	Pages
Wadin v. Czuczka, 16 Ariz. 371, 146 Pac. 491 (1915).....	17
Wilson v. Perkins, Colo., 363 P.2d 492 (1961).....	18
Young v. Bishop, 88 Ariz. 140, 353 P.2d 1017 (1960).....	19

STATUTES

28 U.S.C. § 1291.....	3
28 U.S.C. § 1332.....	2
36 C.F.R. § 221.....	55, 57
Arizona Revised Statutes § 44-101(6).....	18, 19

OTHER

Restatement, Contracts § 330.....	44
Restatement, Contracts § 335.....	43
1 Williston—Contracts § 94; pp. 343-344 (Jaeger's 3rd ed. 1957)....	27
Wixon—Accountants' Handbook 18.3 (1957).....	39

No. 17642

In the

United States Court of Appeals

For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK
GREVEY, co-partners, d.b.a. DUKE CITY LUM-
BER COMPANY, and DUKE CITY LUMBER COM-
PANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT
T. JENKINS and GEORGIA MAE JENKINS, gen-
eral partners, and GEORGIA MAE JENKINS,
Trustee for JAMES HENRY NAGEL, limited
partner, d.b.a. NAGEL LUMBER & TIMBER
COMPANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited part-
nership,

Appellees.

Brief for Appellants

This is an appeal from a final judgment of the United States District Court for the District of Arizona. The case was tried to the court which awarded plaintiff-appellees \$429,883.40 as damages for defendant-appellants' refusal to sell them \$250,000 worth of real property for \$325,000. The property in question is one-half a lumber mill in Winslow, Arizona.

The questions for decision below were whether the parties had in fact made a contract and, if they had, the extent of appellees' injury.

The court below found a contract. Although the only evidence of record demonstrated that the fair value of one-half the mill was in the neighborhood of \$250,000, the court estimated and projected fifteen years into the future the profits it found appellees might have earned from ownership of one-half the mill. It then discounted this figure at four percent to arrive at appellees' swollen award.

Appellees succeeded in convincing the court below to ignore or sweep aside the business realities of the transactions which led to this litigation. The District Court accepted appellees' contention that the parties' conduct be viewed as occurring in a never-never land where options remain open forever and the value of any property can magically be trebled by estimating "future profits." All this is far removed from the actual workings of the market place at Winslow, Arizona. It is contrary to law.

JURISDICTION*

The District Court took original jurisdiction of this case under the provisions of 28 U.S.C. § 1332. The matter in controversy, exclusive of interest and costs, exceeded \$10,000. (Amended Complaint, Paragraph II (R. 30); Amended Findings of Fact, Paragraph 3 (R. 183)). The individual appellants were all citizens of the State of New Mexico. They were the sole members of appellant partnership. (Amended Complaint, Paragraph I(b) (R. 29); Answer to Amended Complaint, Second Defense, Paragraph I (R. 35); Amended Findings of Fact, Paragraphs 2, 5 (R. 183-184)). The individual appellees were all citizens of the State of Arizona. They were the sole members of appellee partnership. (Amended Complaint, Paragraph I(a) (R. 29); Amended Findings of Fact, Paragraphs 1, 4 (R. 183-184)).

*The references in this brief to the printed record are thus: (R. 101); the references to the exhibits thus: (Ex. A).

This Court has jurisdiction to review the Judgment of the District Court under the provisions of 28 U.S.C. § 1291. The Notice of Appeal was filed in the District Court within 30 days after entry of final judgment (R. 201-202). Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This is an action for damages for failure to sell a one-half interest in an Arizona lumber mill and its appurtenant property. The Nagel family, including Robert Jenkins, the son-in-law of the house, owned and operated a large lumber mill in Winslow, Arizona, as Nagel Lumber & Timber Company. The Nagels, Jenkins, and Nagel Lumber & Timber Company were plaintiffs below, and they are appellees in this Court. There was another lumber mill in Winslow. It was owned and operated by the Gallaghers and the Kaplans, doing business as Arizona Timber Company, New Mexico Timber Company, and Bernalillo Lumber Company. This latter mill is the mill in issue in this proceeding. This mill and its appurtenant property are sometimes referred to in the pleadings and in the transcript as the "Gallagher Properties." Maurice Liberman and his two brothers, Joseph and Jack Grevey, were residents of Albuquerque, New Mexico. They also were active in the lumber industry, doing business as Duke City Lumber Company. Duke City purchased the Gallagher Properties from the prior owners. When Duke City later refused to sell a one-half interest in the Gallagher Properties to the Nagels, Jenkins, and Nagel Lumber & Timber Company, the Nagel family and their company brought this action against Duke City and its partners. Maurice Liberman, the Greveys, and Duke City Lumber Company were defendants below. They are appellants here.

In the late summer of 1958 the prior owners of the mill offered to sell the whole mill to appellees for \$500,000 cash (R. 275-276, 288, 310, 326, 375, 1807, 1905), but appellees did not accept this offer (R. 312-315, 333-335, 375-378, 430-434, 448, 1813-1814, 1828-1832, 1904-1908). In early September of the same year

appellants offered \$500,000 for the whole mill (Ex. 1 (R. 1414-1419); (R. 785-786, 1501-1502)). They had good reason to believe that their offer would be accepted (R. 872, 961). The prior owners had, however, promised appellees that they would have a right of first refusal should an offer for the mill be received (R. 271-274, 309, 1786-1798, 1895-1904). When the prior owners failed to accept appellants' offer, appellants thought that appellees might have bought the mill (R. 786-788, 1528-1530). In fact, they had not, but while appellant, Maurice Liberman, was in Winslow finding this out (R. 381, 1838, 1916), the parties discussed the lumber business in the surrounding area, discovered that each wanted the mill for a particular and different purpose and that their separate interests in purchasing it were neatly complementary (R. 282-283, 329, 383, 397, 446-447, 1838, 1921).

Appellants were New Mexico lumber operators whose only contact with Arizona was that they controlled a large block of the only privately-owned timber in the Winslow area (R. 290, 782, 1462-1465). Timber-cutting contracts required that all this privately-owned timber be cut by 1965 (R. 689-690). Appellants needed an Arizona mill to mill their Arizona timber (R. 1326).

Appellees controlled another block of the same privately-owned timber (R. 307). As the owners of the only other mill in the Winslow area, they already had a mill of capacity sufficient to mill all their privately-owned timber within the required seven-year period (R. 397, 445-446). But, as aggressive businessmen, they wanted to purchase their chief competitor at the end of that period when the local supply of privately-owned timber would be exhausted (R. 397).

In light of these complementary desires of the parties, their conversation in Winslow inevitably drifted toward a consideration of the benefits to be derived from buying the mill together (R. 282-283, 329, 383, 446-447, 1838, 1921). Each felt that he could assist the other in effecting a purchase and stated that he would do so. Although the District Court found that the parties

had reached an incredibly detailed oral agreement (Amended Findings of Fact, Paragraph 11 (R. 186-187)), in fact, the entire conversation was highly informal. It was simply understood that purchasing the mill together was a good idea (R. 1539). Maurice Liberman was, on his return to Albuquerque, to prepare an agreement for the parties (R. 284, 293, 335, 386-387, 393, 794-796, 1548, 1571, 1839, 1922).

On his return to Albuquerque, Maurice Liberman prepared and signed two letters for acceptance by appellees (Ex. 3 (R. 1422-1423); Ex. H (R. 1756)). Appellee, Robert Jenkins, signed one which provided:

"It is our understanding that you have a 'first refusal agreement' with Arizona Timber Company to buy out their Plant at Winslow, and, if you turn down this option it is our understanding that we are second in line to buy the Plant. "It is now mutually agreed that in case either of us, (and by this is meant, the companies controlled by the Liberman Group as one party; and the Nagel Lumber and Timber Company or any company controlled by the Nagel family as a second party) will take-up the proposition made by Arizona Timber Company and buy out the Winslow Plant from them, then our companies will have the option to participate in that purchase on a fifty-fifty basis at the same terms as the purchaser will get from the Arizona Timber Company.

"This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent." (Exhibit 3 (R. 1422-1423); (R. 393-394, 455, 799, 1584-1585, 1930-1934)).

The other letter, which concerned appellees' purchase of appellants' interest in the mill in seven years' time, was never signed by appellees (Ex. H (R. 1756); (R. 340, 447, 1856)).

Appellees informed the prior owners that they did not want to purchase the mill (R. 395, 1935). Three weeks later Maurice Liberman flew to New York, and, after almost twenty-four hours' hard bargaining, finally arranged to buy the mill for \$650,000, on terms, nothing down (R. 808-826, 917-941, 1226-1238, 1628-1667) (See Ex. 4).

There is conflict in the evidence on the question whether appellees clearly understood the terms on which appellants purchased, but, in any case, all agree that appellees were given an opportunity to participate on a fifty-fifty basis in the negotiation and purchase of the mill but chose not to do so at that time (R. 300-304, 342-356, 369-370, 813-826, 927-936, 1199-1205, 1228-1238, 1636-1665, 1866-1880, 1950-1954). Since Maurice Liberman had provided in the first letter agreement that any option granted was to remain open until cancelled by mutual consent, he clearly had intended "participate" to allow participation only at the time of purchase from the prior owners (R. 829, 832-833). Appellees, of course, have contended that they could participate after the initial purchase.

Each of the parties was clear in his own mind that the letter agreements alone determined their rights and obligations (R. 338, 340, 393-394, 449-450, 832-833, 1849, 1854-1857, 1932-1934). Each interpreted the letters differently, and each acted throughout in a manner consistent with his own interpretation. Appellees even acted as though they had signed the second letter (See Ex. 2 (R. 1422)). When appellees some months later demanded that they be allowed to purchase one-half the mill for \$325,000, appellants refused to allow them to do so (R. 305-306, 356-360, 403-412, 827-831, 947-957, 1369-1400, 1576-1577, 1676-1686, 1942-1949).

Appellees then brought this action in the Federal District Court for the District of Arizona and, without having put out a penny, were awarded \$429,883.40 on the novel theory that when the fair value of income-producing property is less than contract price, the court can estimate future profits and award them instead.

SPECIFICATION OF ERRORS

(1) The District Court erred in finding that the parties reached any agreement concerning the purchase and operation of the mill during their informal conversation in Winslow. Such findings are clearly erroneous. They are not supported by the evidence,

and they are contrary to law. The parties had neither the intention nor, considering the nature of the transaction discussed, the ability to reach an agreement at that time.

(2) The District Court erred in concluding that the parties made a valid, lawful contract granting an option when Robert Jenkins signed one of the two letter agreements drafted by Maurice Liberman. Appellees recognized that the finding of a perpetual option to participate in the purchase of the mill at the same terms secured by the initial purchaser would be an absurdity and would be fatal to their case. The District Court disregarded the evidence and controlling authority under the statute of frauds and the parol evidence rule to find an option to participate which would expire April 30, 1959. Moreover, any agreement reached was void for vagueness. Appellees, in any case, did not accept appellants' offer.

(3) The District Court erred in awarding excessive damages.

(4) The District Court erred in failing to hold that the proper measure of damages was the difference between appellees' cost of performance and the market value of one-half the mill.

(5) The District Court erred in concluding that appellees were entitled to more than the difference between cost of performance and the market value of one-half the mill if they were awarded the profits it found they might have earned from ownership of one-half the mill.

(6) The District Court erred in awarding damages without taking into account the cost of appellees' performance.

(7) The District Court erred in awarding as special damages anticipated profits in excess of the difference between the cost of appellees' performance and the market value of one-half the mill. There is no evidence whatever in the record to sustain an award of such special damages. On the contrary, the evidence indicates that the parties were bargaining not for profits to be earned from operating the mill together, but for something altogether different.

(8) The District Court erred in computing the profits it awarded.

SUMMARY OF THE ARGUMENT

(1) The District Court's finding that the parties reached any agreement concerning purchase and operation of the mill during their informal conversation in Winslow is not supported by the evidence. The parties in Winslow did not intend to affect their legal relations. Moreover, any agreement intended to be reached in Winslow was void for vagueness.

(2) The District Court's conclusion that the parties made a valid, lawful contract in Albuquerque is clearly erroneous. There was no meeting of the minds of the parties. A finding that any option granted was to expire was a crucial step in reaching the conclusion that there was a contract. The District Court found an option which would expire April 30, 1959. Such finding is contrary to the clear terms of the writing. It is without support in the evidence. And in making such finding the District Court was influenced by an erroneous view of the law; it disregarded the statute of frauds and the parol evidence rule. In any case, any agreement reached in Albuquerque was void for vagueness. In addition, the conclusion that the parties made a valid, lawful contract was clearly erroneous because appellees did not accept the full terms of appellants' offer.

(3) The District Court erred in awarding grossly excessive damages. The damages awarded were nearly 75% more than the total value of the property which appellants refused to sell appellees.

(4) The District Court erred in failing to apply the ordinary measure of damages for breach of contract to sell real property. If the District Court had applied the proper measure of damages, the difference between appellees' cost of performance and the market value of one-half the mill, the court could not have awarded any damages at all. The only evidence of the value of the mill demonstrates that it was worth less—not more—than the contract price at which appellants claimed the right to buy it. An award of \$429,883.40 as the difference between appellees' cost of performance and the market value of one-half the mill is not

supported by the evidence and is contrary to the evidence and clearly erroneous.

(5) The District Court estimated and projected fifteen years into the future the profits it found appellees might have earned from ownership of one-half the mill. It then discounted this figure at four percent. The result of this computation, \$429,883.40, was vastly in excess of the difference between appellees' cost of performance and the market value of one-half the mill. The District Court's award is clearly wrong because the present value of future profits must equal the difference between the discounted value of what is expected to be received from income-producing property and the value of what is presently paid to buy the property. In this case that was the difference between appellees' cost of performance and the market value of one-half the mill.

(6) The District Court did not take into account the cost of appellees' performance in awarding damages. In failing to do so, it was influenced by an erroneous view of the law.

(7) The District Court awarded appellees the profits it found they might have earned from ownership of one-half the mill. A finding that appellants and appellees contemplated the mill would earn profits in the future was a crucial step in awarding future profits. "Contemplated" in the field of special damages means "bargained for." A finding that future profits were contemplated by appellees is without any support in the evidence whatsoever. The evidence is directly to the contrary. They were bargaining for a "position in the forest" (R. 397-398), and there is no evidence what this was worth. It was certainly not worth \$429,883.40.

(8) The District Court's computation of future profits is clearly erroneous. It is speculative and hypothetical. A finding that appellees were reasonably certain to have derived profits from milling timber not under contract is not supported by the evidence. Moreover, in awarding profits to have been derived from milling timber not under contract, the District Court was

influenced by an erroneous view of the law. A recent decision of this Court requires that the award of profits to be earned from milling government-owned timber not under firm contract be set aside as speculative and hypothetical. *Peters v. Lines*, 275 F.2d 919 (9th Cir. 1960). In any case, a projection of future profits stretching over a fifteen-year period is too lengthy to meet the standard of reasonable certainty. Finally, assuming a profit factor which did not vary with the level of operation of the mill is obviously unrealistic and contrary to the evidence.

ARGUMENT

(1) The District Court Erred in Finding That the Parties Reached Any Agreement Concerning the Purchase and Operation of the Mill During Their Informal Conversation in Winslow.

Lumber mills are complex industrial plants filled with expensive machinery. Successful management of such industrial plants requires consummate skill and is highly compensated. Agreements for the sale of lumber mills are forty-page leather-bound volumes filled with tightly-drafted lawyers' language which has been hammered out during long conferences (Ex. 4); (R. 1376)). Even a simple milling contract is a six-part mass of cross-references and complicated details (Ex. 5 (R. 1424-1433)). Lumbermen may discuss in a casual way of a Saturday afternoon the purchase, operation, and use of a lumber mill, but *agreements* for the purchase of lumber mills, *agreements* to operate lumber mills, and *agreements* to mill timber are not made without some formality and, even then, only after detailed examination and attempted resolution of the innumerable complexities involved.

Yet, the District Court found that the parties in Winslow orally *agreed* that appellees would withdraw from negotiations for the purchase of the mill, that appellants would buy it, that appellees would have an option to purchase a one-half interest in the mill, that on exercise of the option the business would be jointly operated, and that milling prices were fixed (Amended Findings of Fact, Paragraph 11 (R. 186-187)). All this is not supported by the evidence.

Maurice Liberman's visit to Winslow on Saturday, September 20, 1958, must be viewed in context. He went to Winslow to find out whether appellees had purchased the mill (R. 381, 786-788, 1528-1530). The evidence is uncontradicted that his conversation with Mrs. Nagel and Robert Jenkins was wide-ranging and of a general nature (R. 279-296, 318-320, 326-332, 337-338, 361-367, 378-393, 788-797, 875-904, 1540, 1545-1560, 1565-1571, 1837-1857, 1916-1929). Each of the parties was an experienced lumber operator. Each owned more than one mill (R. 702-703, 778-781, 937, 1454-1456). They knew what was involved in the purchase of a large milling operation (R. 434-435). Existing inventory, management of the mill, ownership of the timber, salaries, financing, form of the enterprise are only a few of the myriad complexities which leap immediately to mind. If they were touched upon at all, they were lightly brushed over (R. 283-293, 330-332, 337-338, 361-367, 383-384, 389, 390, 392, 436-439, 796-797, 844-845, 882-885, 897-898, 935, 1546-1547, 1843-1857, 1884-1888, 1916-1929). As Mrs. Nagel told Maurice Liberman, the parties were simply exchanging ideas (R. 792, 795-796, 1548).

An agreement is an expression of a common intention to affect legal relations. See *Moore v. Smotkin*, 79 Ariz. 77, 283 P.2d 1029 (1955). Perhaps the evidence would support a finding that the parties in Winslow discussed purchase of the mill, but a finding that they agreed to purchase the mill is not supported by the evidence. The parties in Winslow did not intend to affect their legal relations, and a finding that they agreed on operation or on milling terms is absolutely without support in the evidence (R. 283-293, 330-338, 361-367, 383-384, 392, 436-439, 795-797, 844-845, 882-885, 897-898, 935, 1546-1547, 1843-1857, 1884-1888, 1916-1929).

"Mr. Romley: Did the parties reach an agreement with regard to the continuance of this milling agreement under the new purchase if one should be consummated?"

"Mr. Jenkins: [One of the appellees] I would have to answer no, sir * * *." (R. 392).

"Mr. Moore: Did you actually have an agreement with Mr. Liberman that if this mill were bought and you both

participated in it or exercised an option in it or were in it that you would manage the operation of the mill at Winslow?

“Mr. Jenkins: The way you termed it, I would have to answer that is right. We did not have an absolute agreement.” (R. 438).

This Court in *Joseph v. Donover Co.*, 261 F.2d 812 (9th Cir. 1958), was presented with a transaction almost identical to that presented here. Plaintiff-appellant alleged that he had been deprived of an opportunity to participate with defendant-appellee on a fifty-fifty basis in the purchase from a third party of valuable timber properties. A casual discussion was the basis for the alleged agreement. The District Court found that there was no agreement. Its analysis of facts startling similar to those presented here was so clear and cogent that this Court simply wrote a short opinion and quoted in full text the oral opinion of the trial judge. With only slight adjustment parts of that opinion would have served as a proper opinion of the District Court in this case:

“ I have no doubt that [plaintiff] may have spoken hopefully of the matter. Surely, he wouldn't have come by the way of Portland on his way to California from Chicago if he didn't have hope something of profit might develop. It is quite likely that he did speak hopefully of the matter and perhaps expressed the hope or even suggestion that somehow or other, sometime or other, a deal might be worked out. However, let us keep in mind, now, gentlemen, that here are two total strangers that at that time never have had any transactions before and neither one knows much about the other. Neither one of them knows much about the Kinzua properties or the basis of their possible purchase. [Plaintiff] didn't know much about it. All he knew was that [the third party] said Kinzua was for sale. That is all. * * *

“ It is difficult for me to believe that a man like [defendant] who has lived as long as he has and been in business as long as he has and has stayed out of bankruptcy as long as he has, would buy a “pig in a poke” within a matter of a few hours of meeting a man that he never had seen before

excepting sometime long prior in St. Louis and then only across the room, a man as to whom he knows practically nothing; and that [defendant] would immediately and readily over a casual drink agree to a 50-50 joint purchase in a transaction that was going to run into multiple millions of dollars. I don't believe it. That is not to say it might not have happened, but I don't believe it, and it happens to be my responsibility, at least in the first instance, to decide the fact. * * *

" 'In my judgment, gentlemen, for better or for worse, the words and actions of these parties, [defendant] and [plaintiff] taken together, in other words, the express words and the conduct, all of it taken together, amount to no more, at the very most, than an understanding that Kinzua would be investigated and the possibility explored of a deal in which each of them might participate in some manner and to some extent never specified. I think that is the most you can say about it. I think there was no agreement at all, except at most to investigate and explore possibilities. * * *' " (261 F.2d at 821-822).

An agreement is something definite, something almost tangible. The law exists to give force to agreements, not to conversations, negotiations, or mere hopes. If it were assumed, contrary to fact, that each party understood what the other was bargaining for, and, contrary to law, that the statute of frauds did not apply, there would still, after the conversation of September 20, 1958, have been no agreement. The finding that purchase was agreed upon is not supported by the evidence of record, and the findings that joint operation and milling terms were agreed upon are absolutely unsupported (R. 283-293, 331-332, 361-367, 383-384, 392, 436-439, 795-797, 844-845, 882-885, 897-898, 935, 958, 1546-1547, 1843-1847, 1884-1888, 1916-1929).

But, even if these findings were true, it is incontrovertible that if neither party had made a further move after the Winslow conversation, the matter would have been at an end. The parties, would, as a matter of law, have been held to have negotiated, to have found that, subject to all kinds of further bargaining, it

looked as if there might be an area of potential agreement. However, so long as negotiations were still open, and here, because of the awesome complexity of the transaction being considered, they were still open, they could break down (R. 434-435). The evidence is uncontradicted that vast numbers of essentials were undecided (R. 283-293, 330-338, 361-367, 383-384, 392, 436-439, 795-797, 844-845, 882-885, 897-898, 935, 958, 1546-1547, 1843-1847, 1853-1854, 1884-1888, 1916-1929).

"Mr. Moore: Would you have had any reference to working capital?"

"Mrs. Nagel: Not at that time." [September 20, 1958.] (R. 362).

"Mr. Moore: You had no agreement about the operation of it [the Winslow mill], at all, did you?"

"Mrs. Nagel: No, sir." (R. 364).

"Mr. Moore: You had no agreement with respect to whose timber would go through this mill either, did you?"

"Mrs. Nagel: No, sir."

"Mr. Moore: You had no agreement with respect to whether you would operate both mills in Winslow or only one?"

"Mrs. Nagel: No, sir." (R. 365).

"Mr. Moore: What discussion did you have if any about sharing profits or losses?"

"Mr. Jenkins: I don't believe we had any discussion, but I think the same would be true of his timber, that if he owned the timber, it was generally felt that he would get all the profit off his own timber." (R. 1924).

Had the parties intended to reach an agreement it would have been void for vagueness.

"An offer to buy or sell realty must be so definite and unambiguous that, upon acceptance, the nature and extent of the obligations of the parties to the agreement shall be certain, or of such certainty that the intention of the parties can be collected by fair implication. It must be complete in itself and not leave terms for future negotiations." *Ray v. Frye*, 58 Ariz. 340, 119 P.2d 941, 943 (1941).

And, once again, *Joseph v. Donover Co.*, is apropos:

“Certainly none of the essential elements, let alone the important details of execution, of so important a venture contract were ever expressed and cannot be reasonably implied. Under the evidence which to me seems credible, the relationship between these parties at best is so vague, indefinite and speculative, that as a trier of fact I cannot find assent and agreement on minimum elements amounting to a legally enforceable contract. I am not going to discuss the matter of consideration or any other particular negating contract, because in my judgment the first essential element of the case, that is, agreement to make a joint purchase, is lacking.” (261 F.2d at 822).

It was clearly erroneous to find that the parties *agreed* to anything at Winslow.

(2) The District Court Erred in Concluding That the Parties Made a Valid, Lawful Contract Granting Appellees the Option to Acquire from Appellants, After the Latter's Initial Purchase, an Undivided One-Half Interest in the Mill at the Same Terms Appellants Could Secure from the Prior Owners.

First, there was no meeting of the minds of the parties.

One thing is clear from the evidence: At Albuquerque on September 23, 1958, the parties for the first time intended to make an agreement. They sat down and signed something (R. 297, 393-394, 455, 799, 1584-1585, 1930-1934). Apparently the fact that each party intended an agreement was sufficient to enable the District Court to satisfy itself that each party intended the same agreement. In order to reach this conclusion, the District Court disregarded the evidence and settled rules of law.

One need look no further than the unambiguous language of the first letter agreement to determine the duration of the option to which Maurice Liberman intended to agree:

“This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.” (Ex 1 (R. 1423)).

What was involved here was an option to participate in the purchase of a lumber mill on a fifty-fifty basis at the same terms

the initial purchaser could secure from the prior owners. An option is simply the privilege to watch market conditions over a period of time without risk of a rise in the price of the subject property. Obviously, an option can be defined only in terms of time. Maurice Liberman defined the option to which he intended to agree as open forever unless cancelled by mutual consent. He must, then, have intended to allow participation only at the time of the initial purchase from the prior owners (R. 832-833, 951). In that context participation by the optionee until he himself chooses to release his option is meaningful. In any other context it is an unthinkable absurdity. Appellees themselves recognized this:

“Mr. Moore: As you interpret it, then, after April 30th it had to be renewed?

“Mrs. Nagel: Renewed, yes.

“Q. It didn’t automatically extend?

“A. Well, I wouldn’t think that would be Mr. Liberman’s intentions.” (R. 1860).

That appellees would ever agree to terminate an option to participate after the initial purchase at the same terms appellants had secured from the prior owners would be even more incredible than the existence of such an option itself.

The evidence shows that Maurice Liberman had good reason for wanting appellees’ help in purchasing the mill at the time of initial purchase and for wanting an option that would be open forever. He wanted the right to participate with the Nagel’s should they buy the mill. He needed financial assistance at the time of arranging for the initial purchase, not later (R. 349-355, 813-819, 823-826, 930-931, 1231, 1636-1665, 1870-1880), and previous business dealings with the mill’s prior owners had convinced him that they were likely to be dilatory in coming to a firm agreement (R. 797-798, 1556, 1574). His good judgment on this point was confirmed. He consistently and forcefully maintained throughout his deposition and during the course of the trial that he had intended a perpetual option and he restated his reasons again and again (R. 797-799, 832-833, 976, 1556, 1580-

1582, 1726). That he intended the option to which he thought he was agreeing to remain open until cancelled by mutual consent confirms that he clearly intended to allow the optionee to participate only at the time of the initial purchase at the same terms the initial purchaser could secure from the prior owners of the mill (R. 832-833, 1582).

Appellees, on the other hand, have throughout ably and insistently urged that the duration of the option to which they intended to agree was to be seven months and seven days, no more. Actually it is not quite fair to state that appellees have "throughout" taken this position, since, in their original complaint, they alleged that the option which they had was automatically to be extended for six-month periods unless cancelled by mutual consent (Complaint, Paragraph VI (R. 20)). They must have realized how incredible such an allegation was when coupled with their contention that they could participate in the purchase of the mill, after the appellants had purchased it, at the same terms appellants could secure from the prior owners. At any rate, the amended complaint alleged that the option was to expire April 30, 1959, (Amended Complaint, Paragraph VI (R. 31-32)), and appellees have, since filing the amended complaint, consistently urged that the duration of the option to which they intended to agree was to be seven months and seven days, no more.

Accepting for the moment appellees' timely second thought that they secretly intended, on signing the first letter, to agree to a truncated option to participate after the initial purchase, the evidence of record demonstrates that each party intended an option of different duration and hence an altogether different agreement. In Arizona, as elsewhere, the *Peerless* case* is still governing authority. There must be a meeting of the minds.

"It is elementary that before there can be a binding contract there must be mutual consent of the parties * * *." *Spellman Lumber Co. v. Hall Lumber Co.*, 73 Ariz. 322, 241 P. 2d 196, 198 (1952); *Ray v. Frye*, 58 Ariz. 340, 119 P.2d 941, 943 (1941); *Wadin v. Czuczka*, 16 Ariz. 371, 146 Pac. 491, 493-494 (1915); *Schuehle v. Schuehle*, 21 Wash. 2d 609, 152 P.2d 608, 608-610 (1944).

**Raffles v. Wichelhaus*, 2 Hurl. & C., 159 Eng. Rep. 375 (1864).

The Colorado Court in *Wilson v. Perkins*, Colo., 363 P.2d 492 (1961), has stated it well:

“ ‘A fundamental contractual requirement is that of certainty. The minds of the parties must have met. When one party may have intended a certain obligation, and the other party a different one * * * no contract results.’ ” (..... Colo., 363 P.2d at 494).

If the trial court's finding concerning appellees' intention is accepted, the evidence is clear that the parties each intended to agree to an option of different duration and hence to an altogether different option. As the cases cited demonstrate, such an intended agreement is no agreement at all. There is no credible evidence whatsoever that both parties intended to agree to an option to expire April 30, 1959.

Yet the District Court concluded that appellants had agreed to an option which was to expire April 30, 1959. A finding that April 30, 1959, was the cut-off date was, of course, essential to appellees' case. Such finding was directly contrary to the clear language of the writing. It was contrary to the consistent testimony of Maurice Liberman. He clearly intended only an option by the terms of which each party could join with the other only at the time of the initial purchase and that that right would continue until cancelled by mutual consent. One of appellees' attorneys of record testified that cancelled by mutual consent means cancelled by unilateral action, *i.e.*, without mutual consent (R. 1398). This would be inherently incredible even if it were the testimony of a disinterested witness, which it was not. But, in any case, the District Court could not lawfully find that the parties agreed to an option to expire April 30, 1959.

What was involved here was an option to participate in the purchase of a lumber mill on a fifty-fifty basis at the same terms as the initial purchaser could secure from the prior owners. The lumber mill was real property, no one denies it.

Arizona Revised Statutes § 44-101(6) provides as follows:

“No action shall be brought in any court in the following cases unless the promise or agreement upon which the action

is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized: * * * 6. Upon an agreement for leasing for a longer period than one year, or for the sale of real property or an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing, subscribed by the party sought to be charged."

Whatever the terms of the different options to which the parties have stated they intended to agree, it is clear that any option to purchase one-half the mill falls within the Arizona statute of frauds because it is an option to purchase real property. As such, it is unenforceable unless evidenced by an instrument in writing signed by the party to be charged. Such an instrument is in evidence in this proceeding. Without it this action could not have been brought. *Young v. Bishop*, 88 Ariz. 140, 353 P.2d 1017 (1960); *Durham v. Dodd*, 79 Ariz. 168, 285 P.2d 747 (1955). This writing provides in unambiguous terms:

"This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent." (Ex. 1 (R. 1423)).

In Arizona, as elsewhere, the written instrument must, to satisfy the requirements of the statute of frauds, sufficiently clearly define the real property, the parties, and the terms of the alleged contract. The written instrument in evidence in this case defines the parties and the property. Although, as will be demonstrated, vast numbers of essential terms were not agreed upon and hence could not be included in the written instrument (R. 283-293, 331-338, 361-367, 383-384, 392, 436-439, 795-797, 844-845, 882-885, 897-898, 935, 958, 1546-1547, 1843-1847, 1853-1854, 1884-1888, 1916-1929), one term essential to any option contract was clearly defined. This term was the duration of the option. It is stated in the written instrument that the option is to remain open until April 30, 1959, and automatically to be extended unless cancelled by mutual consent.

Whatever rights appellees may be held to have had must be defined by the writing which both parties signed. Appellees can have no other rights. The statute of frauds would not allow it. The District Court was, then, required by Arizona law to find that any option to which it held the parties to have agreed was to remain open for exactly as long as the unambiguous language of the writing stated that it was to remain open. The District Court was influenced by an erroneous view of the law when it failed to do so.

Moreover, the evidence is clear that the parties, when they signed the first letter agreement in Albuquerque on September 23, 1958, thought that they understood one another (although they did not) and thought that they were agreeing to enough (although they were not). So they sat down and signed an agreement which represented everything to which each party thought he was agreeing at that time. As such, its unambiguous terms could not be varied by parol evidence. In Arizona this is a rule of substantive law. *Richards Development Co. v. Sligh*, 89 Ariz. 100, 358 P.2d 329 (1961); *Diamond v. Chiate*, 81 Ariz. 86, 300 P.2d 583 (1956).

Granted the first letter agreement is patently ambiguous in some respects. Hence this lawsuit. But there is nothing at all ambiguous about the duration of any option described in the letter agreement. Any option granted

"remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent." (Ex. 1 (R. 1423)).

As the Arizona court said in *McNeil v. Attaway*, 87 Ariz. 103, 348 P.2d 301, 305 (1960), "[e]xtrinsic evidence is admitted to resolve ambiguities, not to create them." Parol evidence tending to vary or contradict this unambiguous term of the writing was plainly inadmissible. Any such evidence admitted should have been disregarded.

The District Court faced with an integrated written document for the sale of an interest in real property had no choice but to

hold that any contract it found was governed by the unambiguous provisions of the written document. It failed to do so. This must be error. A letter agreement signed by two parties for the sale and purchase of an ambiguously described parcel of realty for \$10,000 in one month's time cannot lawfully be enforced as an agreement to sell and purchase a parcel of realty adequately identified by oral testimony for \$20,000 in seven months' time simply because the land was initially inadequately identified.

"* * * a court cannot and should not do violence to the plain terms of a contract by artificially creating ambiguity where none exists." *Matsuo Yoshida v. Liberty Mutual Insurance Co.*, 240 F.2d 824, 826 (9th Cir. 1957); see *Lowell O. West Lumber Sales v. United States*, 270 F.2d 12, 17 (9th Cir. 1959); *United States v. Hathaway*, 242 F.2d 897, 900 (9th Cir. 1957).

The frustrated purchaser who seeks to disregard the statute of frauds and the parol evidence rule to make an agreement when none exists seems to be endemic in the lumber industry. Courts which have analyzed the exact problem presented here have given the would-be purchaser short shrift. In *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wash. 2d 109, 173 P.2d 194 (1946), the parties negotiated concerning plaintiff's purchase of defendant's controlling shares in a mill and timber corporation. After the negotiations, defendant made a written offer, which plaintiff alleged he had accepted. He alleged that his acceptance met the terms of the offer by describing in detail the oral negotiations which had preceded the written offer. The court said:

"The only writing in the instant case which could form the basis for a contract between [defendant] and [plaintiff] is the offer contained in the letter of February 5, 1946, written by [defendant] to [plaintiff] and the claimed acceptance of that offer contained in the letter of February 21, 1946, written by [plaintiff] to [defendant], purporting to accept the offer made by [defendant] in his letter of February 5th.

"It will be noted that the complaint sets out in great detail the claimed negotiations leading up to the [defendant's]

letter of February 5, 1946.” (26 Wash. 2d 109, 173 P.2d at 202).

The contract sued on was within the statute of frauds. The court discussed both the statute of frauds and the parol evidence rule at length and then stated:

“In other words, to establish the contract which [plaintiff] contends was made and entered into between the parties, [plaintiff] would have had to establish, by parol evidence, an essential element of the claimed contract in addition to the written offer, and this, in our opinion, it may not do.” (26 Wash. 2d 109, 173 P.2d at 206).

It was error for the District Court in this case not to reach the same result.

By backing into an analysis of what the parties intended under the misapprehension that it could lawfully cut short the duration of any option it might find, the District Court never had clearly in mind *either* the incontrovertible fact that each of the parties intended to agree to a different option *or*, if that hurdle could somehow be overcome, the utter absurdity of a contract to participate forever on a fifty-fifty basis, after the initial purchase of the mill, at the same terms appellants could secure from the prior owners.

This fundamental error in analysis is clearly reflected in the finding of the District Court that appellees would have an option until April 30, 1959, to purchase from appellants an undivided one-half interest in the mill (Amended Findings of Fact, Paragraph 12(a) (R. 188)). Since it is a fundamental error, the conclusion that the parties made a valid lawful contract (Amended Conclusions of Law, Paragraph 2 (R. 195)), rests on an unsound foundation. The District Court should, on remand, be given the opportunity to re-analyze the problem as one involving an option open until cancelled by mutual consent. Such analysis would compel a holding that there was no contract.

The District Court found that appellees understood at the time the first letter agreement was signed in Albuquerque on

September 23, 1958, that they would have an option until April 30, 1959, to purchase from appellants an undivided one-half interest in the mill by paying to appellants one-half the purchase price paid or agreed to be paid by appellants to the prior owners, payable in the manner provided for in appellants' agreement of purchase (Amended Findings of Fact, Paragraph 12(a) (R. 188-189)). If this finding is true, there was no meeting of the minds of the parties. The court below, if it considered at all that clear obstacle to making an agreement for the parties, may have attempted to surmount it by finding that appellants "knew or had reason to know" that appellees "understood" that they were binding themselves to a truncated option (R. 188). Even if it were true that appellants "knew or had reason to know" that appellees so "understood" this would not be enough to circumvent the statute of frauds and the parol evidence rule. Appellants were guilty of no sharp practices. If, contrary to fact, there was a Winslow agreement which allowed the optionee to participate *after* the initial purchase at the same terms the initial purchaser could secure from the prior owners, appellants extended the term of the option to which appellees intended to agree (R. 904-905, 976). Such a change would have been beneficial to appellees; it could not have hurt them. Compare *Lane v. Mathews*, 73 Ariz. 435, 242 P.2d 557, 74 Ariz. 201, 245 P.2d 1025, 75 Ariz. 121, 251 P.2d 303 (1952). Under such circumstances the court was not free to vary the terms of the writing. *Bradley v. Industrial Comm'n*, 51 Ariz. 291, 76 P.2d 745 (1938); *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649, 651-652 (1892), *questioned on altogether different grounds*, *Canada Del Oro Mines, Ltd. v. Collins*, 4 Ariz. 163, 36 Pac. 33, 34 (1894).

But, in any case, it is simply not true that appellants knew or should have known that appellees understood that they were binding themselves to a short-term option. If anyone *should* have known anything, appellees should have known that appellants intended a perpetual option and hence participation only at the time of the initial purchase from the prior owners. An offer to

participate at any other time would, under the circumstances, have been too good to be true (R. 1860).

Whatever vague hopes appellees may have carried with them to Albuquerque as the result of the informal conversation three days before in Winslow were knowingly altered when Robert Jenkins signed the first letter agreement. It was clearly erroneous and contrary to the evidence to find that appellees understood anything except that the letter agreement fixed their rights and obligations. They knew the duration of the option Maurice Liberman had in mind. They said so themselves. Robert Jenkins testified as follows:

"* * * Mr. Liberman had already written the agreement and he handed it to me. Mr. Grevey got a call. I read the agreement, I believe there were two or three copies, I am not sure, and handed it to Dale Nelson, our comptroller that was with me. He read it through and I realized it was not in substantially—it was not what we had agreed upon but it was changed somewhat. And I asked Dale if he thought the changes would affect us materially, and the two of us concluded I believe no and I signed the letter without protest and we went from there to Gallagher's office." (R. 394).

"Mr. Moore: Then the last paragraph, did you say anything to Mr. Liberman about that?

"Mr. Jenkins: No, sir * * *

"Q. I was going to ask you. This discussion with you and Mr. Nelson, did you step out of the office and discuss that privately, or did you discuss it there in the presence of Mr. Liberman?

"A. In the presence of Mr. Liberman.

"Q. Was there anyone else present?

"A. At the time I discussed it with Mr. Nelson?

"A. Yes.

"A. No, sir.

"Q. Then you signed it?

"A. No, sir, I asked Mr. Nelson if he thought that the changes that were *absolutely evident* would affect us in any way or if he concurred with me, they didn't substantially impair our understanding of the agreement made in Winslow the preceding Saturday, and his reply was, 'I don't see

that it affects, that there is anything that can hurt us' and then I signed it.

"Q. What did Nelson say to you?

"A. I just said that.

"Q. I didn't understand that the last statement you were quoting him.

"A. The last statement I was quoting him, yes.

"Q. That was to the effect that there was nothing in it to hurt you?

"A. 'There is nothing in it that I can see that could hurt you.' He concurred with me.

"Q. Then after you signed it, did Mr. Liberman sign it or did he sign it before you signed it?

"A. I believe it was signed before I signed it.

"Q. That is, he had signed it?

"A. Yes, sir.

"Q. When he handed it to you or whoever did hand it to you, was Mr. Liberman's signature already on it?

"A. I believe so, yes, sir.

"Q. Did you have any discussion at all with Mr. Liberman about it that day in his office?

"A. About this agreement?

"Q. Yes.

"A. No, sir, just that in essence it was what we had agreed and that there was a change or two, but we didn't see that it affected us in any way, so we were willing to go ahead in full confidence." (R. 1932-1934). (Emphasis supplied).

Mrs. Nagel testified as follows:

"Mr. Moore: Now you allege in the complaint, Mrs. Nagel, in this same Paragraph 6, about Line 12 on Page 4, 'Plaintiffs and defendants agreed that said option would remain in force until April 30, 1959, and would be automatically extended for six month periods unless cancelled by mutual consent.'

"A. That was put in by Mr. Liberman, I didn't agree to that there, but that was in the agreement. I thought it would only run until April the 30th.

"Q. Then you say in the next sentence, 'Plaintiffs accepted the aforesaid proposal made to them by defendants.'

"A. Yes, we did, we signed it.

"Q. At any time did you have any discussion about accounting for profits if you waited two or three years after September, 1958?

"A. No, I wasn't aware that it would be any time after April the 30th at the time we discussed it. It was supposed to be until April the 30th when we discussed it, that would be the time that we would have up until April the 30th to buy.

"Q. Did you read this September 23rd letter signed by Mr. Liberman to Mr. Jenkins when Mr. Jenkins returned from Albuquerque?

"A. Yes, sir.

"Q. Did you make any objection to it to Mr. Jenkins?

"A. Yes, sir.

"Q. What objections did you make?

"A. Well, I said, 'Well, he has in here that in case we purchase the mill, too; we agreed to not purchase it.' And as to the time, April the 30th, that wasn't as we agreed, but it was all right, I couldn't see how it hurt us, so it was all right; but I think I cautioned Bob about—I am talking too far.

Mr. Romley: Go ahead and answer his question.

"A. Well, he didn't ask me this, he asked me if I said anything; if I had any objection. Yes, that was my objections, I said that, but I didn't see how that hurt us.

"Q. Did you say anything else to him?

"A. Yes, sir.

"Q. What did you say?

"A. I said, 'Bob, let this be a lesson to you, when it's not exactly the way it is supposed to be, don't sign it. The way we agreed, this doesn't hurt us, but some other time it may.'" (R. 1854-1856).

A finding that appellees understood the option to which they intended to agree to expire April 30, 1959, is essential to their case. It is directly contrary to the evidence. Therefore, if appellees are to be believed concerning their interpretation that they could participate after the initial purchase, they knew or *should have*

known that they were getting what no reasonable person could ever expect to obtain (R. 1860), a privilege to watch market conditions forever without risk of a rise in the price of the optioned property. Under the circumstances, it was error for the court below to find an agreement.

"If the receiver of the telegram *ought to have known* that there must have been a mistake in the wording of the telegram, from his knowledge of the market, or for other reasons, he cannot under any view by accepting bind the offeror. And the same principle is applicable in any case where the offeree *should know* that the terms of the offer are unintended or misunderstood by the offeror. The offeree will not be permitted to snap up an offer that is too good to be true; no agreement based on such offer can be enforced by the acceptor." 1 *Williston, Contracts*, § 94, pp. 343-344 (Jaeger's 3rd ed. 1957). (Emphasis supplied).

And appellees not only should have known, they actually knew. They only concluded "This doesn't hurt us." (R. 394, 1855-1857, 1932-1934). What an understatement!

Williston's policy of fundamental fairness was recognized in *Korrick v. Tuller*, 42 Ariz. 493, 27 P.2d 529 (1933). Two survey descriptions were employed in drawing up escrow instructions. One description would have given defendant more land than the other and more land than defendant knew plaintiff intended to convey. Defendant discovered the discrepancy, said nothing, and took plaintiff's deed with the description more favorable to himself.

"When he discovered the error, knowing as he did that plaintiff was laboring under the belief that the two descriptions were the same, candor and frankness should have prompted him to inform plaintiff of the error. Instead he took advantage of plaintiff's ignorance, to the latter's injury and to his profit. His conduct, we believe, may with propriety and justice be characterized as inequitable. Perhaps the course he adopted would be considered just in other business transactions, but we cannot accept this standard as proper." (42 Ariz. 493, 27 P.2d at 531).

A finding that appellants knew or should have known that appellees intended to agree to an option to expire April 30, 1959, is even more incredible. It was "obviously evident" to Robert Jenkins that the unambiguous final paragraph of the first letter agreement provided that the option was to remain open forever (R. 1933). Mrs Nagel noticed that the option stated in the letter went beyond the April 30th deadline she had discussed with Mr. Liberman, but she concluded "it was all right" as written because it did not hurt her (R. 1854-1855). These sworn statements of the two principal negotiators for the appellees that both of them understood the writing to give them an option going beyond April 30th are directly at variance with the finding that they "understood" from the language of the writing that the option would expire April 30th. The finding is clearly erroneous. *A fortiori*, the finding that appellants knew or should have known that appellees so understood the writing is also wrong. How could appellants know? Why should they have known? If the answers to these essential questions are of record, the District Court has not pointed them out, nor has diligent review of the record revealed them. It was clearly erroneous to hold appellants bound by appellees' secret unexpressed intention, for there is no evidence whatever to support this finding of the District Court.

The District Court's finding concerning the duration of any option granted was a crucial step in reaching the conclusion that there was a contract. It is not supported by the evidence; it is contrary to the evidence; and the trial court was influenced by an erroneous view of the law. For these reasons alone this judgment must be reversed. *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 289 F.2d 222, 227 (9th Cir. 1961); *Joseph v. Donover Co.*, 261 F.2d 812, 817 (9th Cir. 1958).

Second, any agreement made in Albuquerque was void for vagueness.

In Albuquerque, as in Winslow, whatever the parties may have intended concerning the duration of any option, they did not

agree to enough to make themselves an enforceable contract. The District Court found that the parties, in Albuquerque, not only created an option but agreed to provide working capital and to share profits equally, although even it could not bring itself to find that they had agreed to supply working capital or to share profits equally in Winslow (*Compare* Amended Findings of Fact, Paragraph 11 *with* Paragraph 12(a) (R. 186-187, 188-189)). And no one has suggested that the parties had spoken to one another concerning these matters in the interim. This indicates the laxness of the creative effort employed throughout to make an agreement where none existed. These findings and the finding that milling terms were agreed upon in Albuquerque are not only unsupported and contradicted by the evidence (R. 283-293, 331-338, 361-367, 383-384, 392, 436-439, 795-797, 844-845, 882-885, 897-899, 935-946, 958, 1546-1547, 1843-1847, 1853-1854, 1884-1888, 1916-1929), they are insufficient, as a matter of law, to give rise to an enforceable obligation.

Any transaction attempted to be agreed upon in Albuquerque was no less complex than any discussed in Winslow. Yet in Albuquerque as well, even accepting every fact found, vast numbers of essentials were left undecided (R. 283-293, 331-338, 361-367, 383-384, 392, 436-439, 795-799, 844-845, 883-885, 897-899, 935, 958, 1546-1547, 1843-1847, 1853-1854, 1884-1888, 1916-1929). At best, the parties had no more than an agreement in embryo. As for the essentials left hanging, Mrs. Nagel stated it well:

"I think that we were entitled to buy fifty percent of this plant and the timber according to our agreement with Mr. Liberman, he was supposed to sell us fifty percent. Now, as to how we would have worked it out, I don't think anyone knows that really." (R. 364).

Further negotiations were required. They did not occur. Under such circumstances, it was error to find an agreement.

"As long as any substantial or material matters are left open for further negotiation or consideration on an essential or necessary element of a proposed contract, the contract is

not complete, and the agreement, if there has been such, is not enforceable as a legally enforceable contract.' ” *Joseph v. Donover Co.*, 261 F.2d 812, 820 (9th Cir. 1958); *Ray v. Frye*, 58 Ariz. 340, 119 P.2d 941, 943 (1941); *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wash. 2d 109, 173 P.2d 194, 206 (1946).

If Maurice Liberman, in January 1959, had told appellees that they could then participate, although they had no right to do so, no court could have unsnarled the tangled mess which would necessarily have resulted as the parties tried to move forward in lock step. Appellants should not be penalized \$429,883.40 now for refusing to go ahead with an unenforceably vague agreement in 1959.

Third, appellees did not accept appellants' entire offer.

Appellees have consistently slurred over the existence of a second letter agreement prepared by Maurice Liberman. This letter, addressed by appellants to appellees and containing a line on which appellees should sign to accept, provided as follows:

“Concerning our letter of September 23, with reference to the sale of the Arizona Timber Company’s Plant at Winslow, this is to confirm our verbal statement to you.

“It is our intention in case of our purchase of the Plant, directly or through you, to operate it for a period of seven years. After that period we will be willing to sell it to you at a reasonable market price, based on the appraisal of experienced lumbermen, such as Mr. J. B. Edens.” (Ex. A (R. 1756)).

The offer contained in this letter was intended by appellees themselves to be an integral part of any understanding the parties can be held to have reached.

“Mr. Moore: Did you say anything else to Bob about it?

“Mrs. Nagel: I said, ‘Where is our seven year agreement?’ because to me that was the most important, just as important as this, and he said, ‘Mr. Liberman is fixing that up and he will send it.’ So I chewed my nails until he sent it, and then I wouldn’t sign it.” (R. 1856).

After reviewing the first letter agreement, appellees telephoned Maurice Liberman, not to question the duration of the option—they didn't see how a perpetual option could hurt them (R. 394-396, 800-801, 1855-1857, 1932-1934)—but to ask him to include, as part of the understanding they wanted to reach, the right to buy appellants out in seven years' time (R. 339, 396, 800-801). The evidence of record is uncontradicted that this was what appellees were seeking (R. 282-283, 329, 337, 383, 388, 397, 446, 1838-1839, 1850, 1921). They stated again and again that they needed both mills after 1965 to give them a chance to make their own mill a paying operation after all the privately-owned timber was gone (R. 282-283, 329, 383, 397, 446-447, 1838, 1856, 1921).

After appellees had thus reopened negotiations, Maurice Liberman obligingly prepared and signed the second letter agreement which, although the first letter had been signed, both parties intended to be part of any final understanding. He sent it to appellees for acceptance. They neither ever indicated that the letter did not meet with their understanding (R. 340), nor did they accept (R. 340, 447, 801, 1856), although Mrs. Nagel acted as though appellees had signed the second letter when she wired Maurice Liberman in New York:

“Do not wish to release *options* at this time.” (Exhibit 2 (R. 1422)). (Emphasis supplied).

Appellees successfully played down their failure to accept what they themselves understood and desired the full offer made them to be. The District Court consequently and obviously ignored this failure to accept. In its initial findings it quoted the text of the telegram and failed to make the word “option” plural. (Findings of Fact, Paragraph 14(a) (R. 123)). Changing the findings at appellants' request to make “option” plural (Memorandum Ruling on Post-trial Motions (R. 199)), was no mere correction of a typographical error (Amended Findings of Fact, Paragraph 14(b) (R. 190)), it was an exposure of another fundamental error in the court's analysis of the parties' dealings. There is no other reference to this second letter in the findings of the court below.

If the District Court had had both letter agreements in mind in considering liability, it would necessarily have been faced with the problem of purported acceptance of half an offer. It obviously never faced this problem. Since it failed to do so, this Court cannot know how it would have overcome the problem, if indeed it could have done so at all, since, in Arizona, as elsewhere, an offeree cannot accept part of an offer and reject the rest. *Daru v. Martin*, 89 Ariz. 373, 363 P.2d 61, 66 (1961); *Rodriguez v. Secretary of the Treasury of Puerto Rico*, 276 F.2d 344, 349 (1st Cir. 1960).

(3) The District Court Erred in Awarding Grossly Excessive Damages.

A large portion of the record in this case resembles an outline for a cram course for a CPA examination (R. 423-429, 499-587, 605-628, 685-689, 692-702, 1100-1184, 1238-1367). Appellees succeeded in making the trial a battle of accountants. The size of the award, \$429,883.40, demonstrates that the District Court must have been so swept up by the undeniably fascinating clash of expert testimony concerning comparability of accounting systems, proper duration of accounting periods, cost allocation, overrun, attributable expenses, cost of money, depreciation, assumed management fees, and adjustment for partnership withdrawals that it lost sight of the basic questions in issue:

- (1) How much was one-half the mill worth?
- (2) How much would it have cost appellees to buy one-half the mill under the alleged contract?

In Arizona, as elsewhere, when one party wrongfully refuses to sell what he has obligated himself to sell, the law attempts to make the wronged party whole. It allows him to get the benefit of his bargain. The benefit of any bargain to purchase anything is the difference between the contract price and the actual value of the property promised. The difference between the answers to the two questions put is the only measure of the value of the loss of appellees' bargain. No amount of mumbo jumbo concerning future profits or anything else can alter the figure which

measures the difference between the cost of performance and the value of what was promised.

Since appellants paid \$650,000 for the entire mill, appellees' cost of performance would have been \$325,000. The District Court awarded appellees \$429,883.40 for the loss of their bargain. If this award is proper, one-half the mill was worth over \$750,000, which is \$100,000 more than appellants paid for the entire mill, and the entire mill was worth more than \$1,500,000. Such astronomical values are absolutely without support in the record. Appellees themselves did not accept an offer to buy the entire mill for \$500,000 (R. 275-276, 288, 310, 312-315, 326, 333-335, 375-378, 430, 434, 448, 1807, 1828-1832, 1904-1908). Appellants *outbid* other lumber operators in the area (R. 435, 1091-1092, 1723-1725, 1882, 1913-1915); (Ex.C)), including one of the prior owners (R. 966-967, 1913-1914), in purchasing the mill for \$650,000. Robert Jenkins testified that the mill was worth \$500,000 and not more than \$800,000 (R. 439-442). The damages awarded were manifestly excessive. This is reversible error. *Peters v. Lines*, 275 F.2d 919, 931 (9th Cir. 1960).

(4) The District Court Erred in Failing to Hold That the Proper Measure of Damages Was the Difference Between Appellees' Cost of Performance and the Market Value of One-Half the Mill.

In Arizona, as elsewhere, the maximum measure of damages for wrongful failure to sell real property is the difference between contract price and the market value of the property promised. *Tennent v. Leary*, 82 Ariz. 67, 308 P.2d 693, 697 (1957); *Cole v. Adkins*, 69 Ariz. 81, 209 P.2d 859, 861 (1949); see e.g., *Palmer v. Connecticut Ry. & L. Co.*, 311 U.S. 544, 569 (1941) (Mr. Justice Douglas, dissenting); *Reynolds v. United States*, 158 F. Supp. 719, 725 (Ct. Cl. 1958); *Eastwood Homes, Inc. v. Hudson*, 161 Cal. App. 2d 532, 542-543, 327 P.2d 29, 35 (1958); *Crag Lumber Co. v. Crofoot*, 144 Cal. App. 2d 755, 777-780, 301 P.2d 952, 964-968 (1956) (Timber Properties); *Minshall v. Case*, Colo., 364 P.2d 868, 873 (1961); *Crabane v. Swan*, 212 Ore

143, 318 P.2d 942, 948-949 (1957) (Timber Properties); *Platts v. Arney*, 50 Wash. 2d 42, 309 P.2d 372, 375 (1957). Nothing is changed because a business is operated on the real property. *Romer v. Leyner*, 224 Ark. 884, 277 S.W. 2d 66, 70 (1955). For example, in *DeCesare v. Occhiuto*, 64 N.Y.S. 2d 675 (Sup. Ct. 1946), plaintiffs agreed to purchase and defendants to sell a bar and grill and the real property which housed the bar and grill. The court found that defendants had broken their promise to sell.

"As damages, the plaintiffs are entitled to the difference between the contract price and the market price of the real and personal property involved, together with the reasonable legal and other expenses necessarily incurred in reliance on the contracts of sale. * * * The motion to amend the complaint is granted to the extent of including the items of special damages. * * *

"I am satisfied that as of the date of closing there was little or no difference between the contract price and the market price. The damages, therefore, must be confined to the special damages. They are as follows: (1) Legal services in connection with application for liquor license, \$200; and (2) expenses of examining title and other expenses, \$274.79." (64 N.Y.S.2d at 677).

It was error not to apply the proper measure of damages.

The burden is on the party allegedly injured to demonstrate that there is a difference between contract price and market value, when the proper measure of damages is to be applied. There is no quarrel in this case over contract price; it was \$325,000. There is, however, only scanty evidence of record concerning the value of the Winslow mill. Since their prayer for huge damages was woefully inconsistent with any realistic appraisal of the value of the mill, appellees apparently sought to brush over the actual value of the mill. In doing so, they failed to meet their burden of proof. Appellants were under no duty to remedy this failure. *Peters v. Lines*, 275 F.2d 919, 930 (9th Cir. 1960). Since appellees can have lost only the difference between market value and contract price and since market value cannot accurately be fixed on the basis

of the record in this case, this Court should remand for reconsideration of the question of damages.

Although there is insufficient evidence of record to fix damages properly, there is sufficient evidence of record to demonstrate that damages were fixed improperly. Had the only permissible standard of recovery been applied, appellees would have been entitled only to the difference between \$325,000 and the value of one-half the mill. The value of one-half the mill which the District Court would have had to find to award \$429,883.40, as the difference between contract price and fair value, is absolutely without support in the record.

At best, the mill was worth embarrassingly little more than Maurice Liberman paid for it. Appellees tried to play down this fact. In large measure they succeeded, but once they slipped. Robert Jenkins admitted that \$200,000, or possibly \$800,000, as he said, would have been a reasonable price for the entire mill. Although he had not had a complete appraisal made, he was thoroughly familiar with the mill and its operations and repeatedly stated that \$500,000 was a reasonable price for the mill in August 1958 (R. 439-442). He agreed that its value had not increased when Maurice Liberman bought it in October (*Ibid.*), and there is no evidence that its value had increased between October 1958 and January 1959, the time of appellants' alleged failure to perform. This is the only evidence of record dealing directly with the actual value of the mill. It is appellees' testimony. It is unimpeached, uncontradicted. Its very inadvertence enhances its credibility. It is not definite enough to fix market value, but it demonstrates incontrovertibly that the \$429,883.40 award appellants challenge here is erroneous. Even accepting appellees' own outside estimate of the value of the mill, if the only permissible standard of measuring damages had been applied, they lost only \$75,000, one-half the difference between \$800,000 and the \$650,000 Maurice Liberman paid for the mill.

Moreover, appellees failed to accept an offer to buy the mill for \$500,000 (R. 312-315, 333-335, 375-378, 430-434, 448, 1828-

1832, 1904-1908). Maurice Liberman in fact purchased it for \$650,000, outbidding other lumber operators and one of the prior owners (R. 435, 966-967, 1091-1092, 1497, 1723-1725, 1882, 1913-1915); (Ex. C)). Even if Robert Jenkins' testimony had not fixed the upper limit of any award to which appellees might be entitled, the price at which the mill was *actually* offered and the price for which it was *actually* sold fixed an indefinite but inescapable range of reasonable value which the District Court would simply not have been free to increase by almost one million dollars. It would have been absolutely incredible and clear error to have held that appellees had been damaged \$429,883.40 by not being allowed to pay \$325,000 for only *one-half* a mill (1) when they had failed to buy the entire mill for \$500,000; (2) when other lumbermen in the area had declined similar offers (R. 435, 1091-1092, 1497, 1882, 1723-1724, 1913-1915); (Ex. C); (3) when appellees assumed that Maurice Liberman could buy the entire mill for \$400,000 (R. 319, 327, 1920); (4) when the entire mill had actually changed hands for \$650,000, more than one of the prior owners had been willing to pay to buy out his business associates (R. 966-967, 1640, 1913-1914); (5) when no one had suggested that the value of the entire mill exceeded \$800,000.

(5) The District Court Erred in Concluding That Appellees Were Entitled to More Than the Difference Between Cost of Performance and Market Value if They Were Awarded the Profits It Found They Might Have Earned from Ownership of One-Half the Mill.

No more would need to be said to require reversal of the District Court's grotesque award of \$429,883.40 had much not been made throughout this proceeding of the opinion in *Martin v. LaFon*, 55 Ariz. 196, 100 P.2d 182 (1940) (*E.g.* R. 165). Appellees have held it out as a talisman sufficient to ward off the ugly fact that they lost little, if anything, when appellants refused to sell them one-half of the mill for \$325,000.

Appellees' reliance was misplaced. There is no magic in awarding profits. *Martin v. LaFon* does not hold that appellees are

entitled to more than the benefit of their bargain, the difference between what they would have had to pay and the value of what they lost. Since it is impossible for properly estimated, properly projected, properly discounted anticipated net income from investment property to exceed the present value of the property, *Martin v. LaFon* does not hold that it does. Properly estimated, properly projected, properly discounted anticipated net income always equals the present value of income-producing property. The purchase price of the property must always be subtracted from its present value to measure loss of a bargain to purchase it. The difference between purchase price and present value of income-producing property equals the present value of the net profits reasonably expected to be earned from the property. The District Court did not award \$429,883.40 as the difference between the purchase price and the present value of one-half the Winslow mill. It did not make a finding that one-half the mill was worth over \$750,000; it made *no* finding at all concerning the value of one-half the Winslow mill. The District Court apparently believed that there was some difference between discounted anticipated net income and present value. It erred in concluding that appellees were entitled to more than the difference between cost of performance and present value simply because it awarded them the profits it found they might have earned from ownership of one-half the mill. These profits must equal the difference between contract price and present value. It is clear that the profits the court awarded did not. This was error.

Since the court's error lies in its reading of *Martin v. LaFon*, that case merits exploring. *Martin v. LaFon* did not establish any new law. Actually, the opinion is simply an ordinary opinion in a rather ordinary little case decided over twenty years ago by the Supreme Court of Arizona. It has been cited only once in a reported opinion since 1940. See *Jacob v. Miner*, 67 Ariz. 109, 191 P.2d 734 (1948).

In *Martin v. LaFon* defendant had apparently granted plaintiff an option to buy defendant's unexpired three and one-half

year leasehold interest in a combination hotel-cafe in Phoenix. Plaintiff had paid \$500 for the option and had agreed to pay defendant an additional \$4500 if he exercised the option. Defendant refused to perform. Plaintiff initially claimed only the \$500 he had actually paid. He later amended his complaint to add a prayer for an additional \$30,000 for loss of what he allegedly would have earned from operating the property. Defendant moved to strike the allegations concerning future profits. His motion was granted. Plaintiff's offer of proof was rejected. Both parties rested, and judgment for \$500 was entered in favor of plaintiff, who appealed. The Supreme Court of Arizona reversed and remanded for new trial.

The court held that an allegedly injured plaintiff should not be prevented from recovering the benefit of his bargain. It cited *Anvil Mining Co. v. Humble*, 153 U.S. 540 (1894). In *Anvil*, plaintiff, mining company, had been promised sixty cents a ton for every ton of ore mined. The mine owners broke their promise to allow plaintiff to mine the ore, and the Court allowed plaintiff to recover the difference between sixty cents per ton and the cost of mining the estimated remaining ore in place. *Anvil* is a straightforward and accurate holding. The appellate court in *Martin v. LaFon* was clearly correct in following it. It would be wretchedly unfair to limit someone who had made a good bargain and had then been wrongfully deprived of it to recover simply what he had paid to get his bargain. Yet this is what the trial court in *Martin v. LaFon* would have done. Appellants not only concede, they urge that reversal of such a holding was entirely proper.

Appellants agree that this interpretation of *Martin v. LaFon* is controlling in this case. They concede that appellees should not be limited to recovery of what they gave up to get their alleged option. To so limit recovery would, for one thing, yield a rather bizarre award, a bedraggled oral "right" of first refusal to which the prior owners attached no importance (R. 872, 961). Appellants concede that appellees should have the benefit of their

bargain, if any. What appellants strongly urge is that appellees should not have more.

Unexpired three and one-half year terms of leasehold interests in hotel-cafes are not traded over the counter. The interest in *Martin v. LaFon* did not actually change hands close to the time at which defendant refused to sell it to plaintiff, nor had plaintiff or anyone else recently refused to buy it for a definite sum. In any case, short-term leasehold interests of business property are frequently valued by projecting anticipated net income over the term and then discounting it to fix fair market value. As in the case of valuing life estates or future interests, although there is grave risk that the value computed will not, in fact, be the actual value, there simply is no other way to do it. Given the short-term leasehold interest in *Martin v. LaFon* and given the fact that no external evidence of market value was apparently of record, the Supreme Court of Arizona properly remanded to allow plaintiff to make the only feasible showing of the fair value of what he had lost. It sent him back to the trial court to prove what he could reasonably be expected to have earned.

The point is, and *Martin v. LaFon* supports it, that estimating, projecting, and discounting anticipated net income over a reasonable period of time is one method of fixing the fair market value of any income-producing property. It is a theoretical method. Theoretically, there can be no difference between discounted anticipated net income and fair market value. However, the theoretical method of fixing value has grave risks inherent in it.

“ * * * the task of estimating earnings for any considerable period is loaded with complications and yields results that are none too dependable under the most favorable conditions. * * * ” *Wixon, Accountants' Handbook* 18.3 (4th ed. 1957).

Estimating income is subject to error; projecting income is subject to error; discounting is subject to error; selecting a proper period is subject to error; choosing a risk factor is subject to error. Errors can be compounded, as in this case, to yield an

absurd result. The theoretical method of arriving at market value is inferior to fixing market value by receiving evidence of the value at which the property has been offered, accepted, or rejected in the actual market. Sometimes such reliable, external evidence is not available. Here it was available and it is of record. Appellees and *other* lumber operators in the Southwest, had recently failed to accept offers to buy the mill for \$500,000 (R. 312-315, 333-335, 375-378, 430-435, 448, 966-967, 1091-1092, 1497, 1723-1724, 1813-1814, 1828-1832, 1882, 1904-1908, 1913-1915); (Ex. C), and the mill had recently changed hands for \$650,000, more than one of the prior owners was willing to pay for it (R. 966-967, 1640, 1913-1914). These external facts coupled with Robert Jenkins' testimony that the outside value of the entire mill did not exceed \$800,000, (R. 439-442), must fix some limits on any risky, error-prone computation. If the District Court took into consideration the cost of appellees' performance, one-half the mill was worth over \$750,000, the \$429,883.40 awarded plus the \$325,000 appellees would have had to pay for the opportunity to earn \$429,883.40. This value is absurd in light of the external facts. Since there is no evidence whatsoever to support it, the District Court quite properly did not find that one-half the mill was worth over \$750,000.

The District Court made no finding as to the value of the mill, or half of it. The Court obviously ignored the actual value of the mill. It must have believed that it could do so because it was awarding future profits. This was error. The present value of future profits is the difference between the discounted value of what is properly expected to be received from income-producing property and the value of what is presently paid to buy the property. But the discounted value of what properly is expected to be received from income-producing property must equal the present value of the property. If there is any difference between actual present value and what the District Court failed to realize must be computed present value, the error must be in the computation. Had the District Court recognized that a market

value in excess of \$1,500,000 for the entire mill was inherent in its award, it would have seen its error. Awarding future profits can not make a \$500,000 mill, a \$650,000 mill, or even an \$800,000 mill worth \$1,500,000. The District Court erred in believing that it could.

(6) The District Court Erred in Awarding Damages Without Taking Into Account the Cost of Appellees' Performance.

In *Martin v. LaFon*, appellees' touchstone, plaintiff had paid \$500 for an option to purchase defendant's unexpired three and one-half year leasehold interest for \$4500. The Arizona Supreme Court held that plaintiff should not be limited to recovering \$500 when defendant failed to perform. It directed the trial court to allow plaintiff "to show that from the gross receipts of said hotel, less the rentals provided in the lease, and the reasonable cost of operating said hotel, he would have been able to have made a profit—have made prospective profits in the amount of \$30,000 during [the balance of] the term of said lease * * * and that he ha[d] been damaged in said amount. * * *" (55 Ariz. 196, 100 P.2d at 183).

Since the District Court did not write an opinion, it is difficult to be certain of the exact point at which it went astray in modeling its opinion on *Martin v. LaFon*. It was perfectly obvious that the Winslow mill was not worth \$1,500,000. Perhaps the District Court interpreted *Martin v. LaFon* as holding that the plaintiff in that case could recover what he would have received had he exercised his option, without taking into account the balance of the purchase price. The words of *Martin v. LaFon* lend themselves to this interpretation. Such an analysis would indicate a value of twice \$429,883.40, or about \$860,000, which, although excessive, is only slightly more than Mr. Jenkins' maximum.

Appellants are, of course, aware that there was a purported adjustment for depreciation in the tangled computation on which the court outwardly based its award. But there was clear error somewhere. It seems as likely that the court simply held that

appellees should have the extra \$429,883.40 it found appellants would get, as that one-half the mill was worth \$750,000.

If this is what the District Court did, it, of course, committed glaring error. An allegedly injured plaintiff can recover what he would have received had defendant performed, as promised. But what he would have had to pay to get defendant to perform cannot be disregarded. Whatever the language of *Martin v. LaFon* may appear to say, defendant there would, at most, have been liable for \$26,000 on remand, \$30,000 net profits plaintiff would have earned, plus \$500 paid, less the \$4500 balance of the purchase price. Appellants in this case paid \$650,000 for the mill. They paid \$325,000 more than they would have had to pay had appellees participated. If the court was awarding appellees the extra \$429,883.40 it found appellants would earn because appellees were not part owners of the mill, it should have subtracted \$325,000, the cost of appellees' performance. It was required to do so by law.

Matson v. Bradbury, 40 Ariz. 140, 10 P.2d 376, 378-379 (1932):

Defendant had guaranteed plaintiff-subhauler a flat payment, a minimum number of round trips, and a minimum tonnage of freight to be hauled monthly at a fixed compensation per ton. Defendant did not supply the freight. Plaintiff brought an action for lost profits. Plaintiff's claim did not take into account his cost of performance. The court held:

"It was not questioned but that plaintiff did not make, by 22 trips, the minimum number of trips stipulated and was therefore saved the cost of such trips, for which defendant should receive credit." (40 Ariz. 140, 10 P.2d at 379).

Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, 92 (10th Cir.), *cert. denied*, 347 U.S. 976 (1954):

Plaintiff-theatre owners made out a case of violation of Sections 1 and 2 of the Sherman Act. They sought treble damages for loss of profits resulting from the unlawful restraint of trade. Plaintiffs demonstrated loss of profits by comparing their opera-

tions with those of other theatres which had been able, as plaintiffs had not, to secure first-run movies. The court considered the profits the other theaters had made and then made an additional adjustment to reflect the costs plaintiffs would have incurred had they been allowed to exhibit first-run movies:

"In arriving at such results [the profits of other theatres] film rentals and advertising costs were deducted from gross receipts. In respect to the Broadway [plaintiffs' theatre] additional deductions were made for increased rental it would have paid if operated on a first-run basis and the increased cost of advertising it would have incurred as a first-run theatre." (210 F.2d at 92).

This general principle is also recognized in the Restatement of Contracts:

Restatement, Contracts § 335 (1932):

"If the defendant's breach of contract saves expense to the plaintiff by discharging his duty of rendering a performance in return or by excusing him from the performance of a condition precedent, the amount of this saving is deducted from the damages that would otherwise be recoverable."

The District Court's estimate of the benefit appellants secured because appellees were not owners of one-half the mill exceeded any estimate based on Robert Jenkins' appraisal of the value of the mill, but even accepting the court's figure, if the cost of appellees' performance, \$325,000, were subtracted from \$429,883.40 the award would be reduced to \$104,229.40.

(7) The District Court Erred in Awarding Special Damages.

There were no grounds for awarding punitive damages, and the court below stated that its \$429,883.40 award was not an award of punitive damages (R. 101). Yet appellees were clearly awarded more than the difference between \$325,000 and the value of the one-half the Winslow mill. The District Court must, then, have awarded special damages, though it did not describe them as such.

Since appellees' whole presentation was patterned on *Martin v. LaFon*, the court must have relied on *Martin v. LaFon* in awarding special damages. Although no special damages were awarded in *Martin v. LaFon*, the opinion in that case correctly states the law of special damages. The District Court did not correctly apply the law of special damages in awarding future profits in this case.

Martin v. LaFon held simply that a plaintiff wrongfully deprived of a right to buy property should have the benefit of his bargain. The benefit of a bargain to buy anything is the difference between contract price and present value of the property lost. The Arizona court held that, in the absence of external evidence of present value, when income-producing property is lost, plaintiff can compute present value by discounting anticipated net income. Cost of performance must then be subtracted to fix the benefit of the bargain. That was no award of special damages, for actual present value theoretically equals computed present value, and the difference between contract price and present value measures damages which arise "naturally, *i.e.*, according to the usual course of things" from breach of contract to sell property. *Hadley v. Baxendale*, 9 Exch. *341, *354; *Restatement, Contracts* § 330 (1932).

The Arizona Court in *Martin v. LaFon* confused itself by referring to recovery of out-of-pocket reliance as "general damages" and recovery of the difference between contract price and computed present value as "special damages." It must have been bewildered by the word "profits." Discounted profits expected to be received from income-producing property measure the difference between contract price and present value. They are not special damages. Profits expected to be earned from running a mill do not measure the value of carrying a mill shaft as in *Hadley v. Baxendale*, 9 Exch. *341. Such profits must be specially bargained for to be recovered. The court in *Martin v. LaFon* did not award special damages. The District Court in this case erred in believing that

it could disregard the actual value of one-half the Winslow mill because it awarded appellees anticipated profits.

However, the Arizona court in *Martin v. LaFon* gave an exposition of the law of special damages as correct as it was superfluous:

"The physical property covered by the lease was *practically useless* except for the purpose of running the business. It is apparent to us that the record shows the parties must have known the *only* reason why plaintiff desired the assignment of the lease was so that he could continue the operation of that particular business on that particular site, for the purpose of making a profit by its operation, and considered that as the *inducement* for the option. On this state of the record, we think the trial court erred in striking from the complaint the allegations of special damages by a loss of future profits. * * *". (55 Ariz. 196, 100 P.2d at 183). (Emphasis supplied).

This is classic *Hadley v. Baxendale* language. It could almost have come from the English Reports:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were *communicated by the plaintiffs* to the defendants and thus known to both parties, the damages resulting from the breach of such a contract would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and *communicated*." (9 Exch. at *354). (Emphasis supplied).

It demonstrates that special damages are damages which do not arise naturally, *i.e.*, according to the usual course of things. In Arizona, as elsewhere, such damages are specially awarded be-

cause they were specially bargained for. *Higgins v. Arizona Savings & Loan Ass'n.*, 90 Ariz. 55, 365 P.2d 476, 482-483 (1961); *Cole v. Adkins*, 69 Ariz. 81, 209 P.2d 859, 863-864 (1949); *McFadden v. Shanley*, 16 Ariz. 91, 95, 141 Pac. 732, 733 (1914).

The evidence of record in this case shows conclusively that appellees were bargaining *not* for anticipated profits from the Winslow mill, but only for a chance to decrease competition in the bidding for government timber after 1965, when all privately-owned timber around Winslow would be gone. Properly estimated, properly projected, properly discounted anticipated profits cannot exceed the difference between contract price and the present value of one-half the mill. Any anticipated profits in excess of that figure must be special damages, but they could not be awarded as special damages in this case. They were not bargained for. And any increased opportunity to buy government timber in the future was not worth \$429,883.40.

The privately-owned timber in the Winslow area is the key to a proper analysis of the relationship of the parties in this case. Two mills had been built in Winslow near a large pool of timber, all of which was owned by the United States (R. 290). Appellees owned one of these mills; the other gave rise to this litigation. Each of the two mills was designed to operate efficiently only when fed a large volume of timber (R. 283, 444-445, 454, 836-837, 1896). And so long as all the timber in the area was owned by the Forest Service, barring the normal risks of fire and disease and the risk that some one else would bid for the timber, appellees expected that their mill would continue to be operated efficiently. Then, suddenly, the entire situation was changed.

As the result of litigation a very large block of the government-owned timber fell into private hands (R. 289-291, 715-718). The part of this timber accessible to Winslow mills was sold. Appellees, appellants, and the Gallagher interests were the ultimate purchasers (R. 715-718). A condition on their purchase was that all this timber be cut by 1965. This period was later extended to early 1966 (R. 689-690). By their purchase appellees ensured

that their hungry mill would be well fed at least until 1965. But the orderly market availability of timber in the area had been permanently disrupted. After 1965 a withering scramble for the remaining sorely depleted government timber supply was bound to ensue if two large mills attempted to operate (R. 792, 1896-1897), and the risk was great that a small mill, efficient at low volume, would be built near Winslow and underbid both large mills (R. 140, 496). To avoid this risk was the reason appellees and the Gallaghers had offered to mill appellants' Winslow timber in the first place (R. 1463-1466). Appellees wanted to decrease competition for government timber after 1965. That is why they got their "right" of first refusal (R. 1786, 1896). That is what they were bargaining with Maurice Liberman to get. They stated again and again what it was they wanted:

"Mrs. Nagel: * * * I said, 'Well, we should, it would be the sensible thing to do because you have timber to cut on the mill, and we, our objective is to have the mill when the Aztec is cut out so that we will have the Forest Service timber, so it will be a good mutual agreement, or arrangement.' * * *" (R. 1838).

"Mr. Jenkins: * * * He would be assured of having his logs, the Aztec logs that he had milled, and we would eventually wind up with the mill in the position in the forest which accomplished both our purposes." (R. 1921).

"Mrs. Nagel: Yes. And I asked him if he thought we could get along. I said that that would be the reasonable or the logical thing to do because we each one had an objective to be accomplished. He had his Aztec timber which he wanted to cut on that mill and we would like to, had always since the Aztec had disrupted our sustained yield, we had always thought of buying that mill or—

"The Court: Is this what you said to him, Mrs. Nagel or what you were thinking?"

"A. Oh, I told him that we needed the timber after the Aztec was cut for our mill to make a paying operation." (R. 282-283).

"Mrs. Nagel: I said that what we were interested in was the timber rights and he was interested in getting his Aztec cut and he proposed the option—I mean he proposed

an agreement he would agree to sell to us after seven years, which would give us that timber right.” (R. 329).

“Mr. Jenkins: * * * Then we got around, Mrs. Nagel got around to asking him, she said, ‘who would—.’ First she said ‘We have got to have the timber that is behind this mill to sustain our level of operation in this mill after the Aztec timber is complete. If seven years is all you are interested in then this will be a real good arrangement for both of us.’” (R. 383).

“Mr. Romley: Did the Nagel Company have any need at that time for just the physical plant itself?”

“Mr. Jenkins: No, sir, definitely not.”

“Q. What was it you were negotiating for with Gallagher?”

“A. We needed the position that his mill represented in the forest.” (R. 397).

“Mr. Jenkins: The complete discussion. Mrs. Nagel told Mr. Liberman we wanted the position that we figured we were required to bid on the timber on the acquisition of this mill and that was what we were primarily interested in, and we needed it to sustain our level of operation after we had completed our Aztec cut. Mr. Liberman said well, he was only interested in operating in Winslow for about seven years and that at the end of that time his children would be either grown or close to getting up to the age where they would be not too much dependent upon him, and his brothers, * * *” (R. 446-447).

Appellants’ objective in attempting to deal with appellees is equally clear. Appellants were New Mexico timber operators who had bought a substantial block of timber, slightly over 60,000,000 board feet, in Arizona, far from their normal base of operations. That timber had to be cut by 1965 (R. 689-690). Appellants had entered into an expensive milling contract with the prior owners of the mill. They wanted to get out of it. They wanted to mill their own timber for seven years (R. 1326). That is what they were bargaining with appellees to get. They stated again and again that that was what they wanted (R. 382-383, 792, 861-862).

Yet the District Court found that appellees and appellants contemplated that the mill would earn substantial profits in the

future. "Contemplated" means "bargained for" when it comes to fixing special damages. *Martin v. LaFon*, 55 Ariz. 196, 100 P.2d 182, 183 (1940). The District Court's finding was essential to an award of future profits as special damages, but it was directly contrary to the evidence.

It is true that, after merciless badgering, appellees finally forced Maurice Liberman to utter what they have apparently throughout considered a cabalism. He finally stated the rather unstartling fact that he expected any transaction he may have intended to enter with appellees to be profitable (R. 588-591, 1730-1734). Since appellees have made so much of it (or, more accurately, of parts of it (R. 900)), the entire interchange merits repeating at length):

"Mr. Romley: Now, Mr. Liberman, when you were talking with Mrs. Nagel and Bob Jenkins in the Nagel Lumber Company office on September 20, 1958, you were contemplating at that time acquiring on a fifty-fifty basis, if a deal could be negotiated, a going business, isn't that right, a going business, being that of the Arizona Timber, or Arizona Lumber & Timber Company?

"Mr. Liberman: Yes.

"Q. And you were contemplating, or presuming, at least, that that business would and could be operated by the new owners, you and the Nagels, at a profit, isn't that right, sir?

"A. I expect it, yes.

"Q. You expected it too, both of you did?

"A. Yes.

"Q. And you entered into this agreement with the Nagel Company in that expectation that if you could acquire the business you could operate it and make a profit?

"A. Like any other business, you can make a profit or a loss, I couldn't predict.

"Q. Well, you couldn't predict it, true, but at the time you acquired it, or at the time you were talking with the Nagels about acquiring it together on a fifty-fifty basis, you expected that if you did so, you would make a profit from the operation of that business, that's true isn't it?

"A. Any transaction I make, I expect to make a profit, but sometimes I have losses, too.

"Q. But in this particular transaction, as distinguished from any transaction that you mentioned, in this particular transaction that you were to enter into with the Nagels on a fifty-fifty basis, at the time you made that deal you expected to make a profit, didn't you?

"A. This transaction is like any other transaction.

"Q. Now will you answer my question?

"A. I expect always to make a profit, but like in any business, I can't predict if we are going to finish out with losses or profits.

"Q. Well, I realize that, sir, any more than any of us can predict anything, but at the time you were negotiating with the Nagels, or the two of you going in on this fifty-fifty basis—you understand what I mean, on September 20th?

"A. Yes, sir.

"Q. At that time you both felt that the Arizona Timber Company was being operated at a profit, isn't that right?

"A. I didn't know.

"Q. Well, you expected that it was, didn't you?

"A. Mr. Romley, as I tell you, any transaction, business transaction that I make, I expect to make a profit, but it is a hazard. It's like any business, we have profits and losses.

"Q. Yes, but you don't enter into a transaction if you think it is going to be a loss, do you?

"A. No.

"Q. You enter into those transactions that you think will realize a profit, that is right, isn't it?

"A. Any transaction I make, I expect to make a profit, like any other transaction, but it's possible it can have a loss, too.

"Q. And in this particular transaction you entered into it with Mrs. Nagel in the expectation and hope that you would make a profit?

"A. I couldn't predict prices, I couldn't predict anything; how could I know that I am going to have a profit?

"Q. I am not asking you if you knew, sir, I'm asking you if it isn't true that you entered into this agreement with the Nagel Lumber & Timber Company in the expectation that if the purchase were consummated you could operate the business, a going business, as you say, at a profit.

"A. Mr. Romley, we have cost factors and we don't know, and labor factors, and intangibles, and we never know if we are going to have profits or losses, and that is every businessman's chance.

"Q. Well, if you would know that this business would be operated at a loss, you wouldn't have entered into a fifty-fifty deal, would you?

"A. No.

"Q. That's true isn't it?

"A. Yes, sir.

"Q. So if you had anticipated or expected that this business would result in a loss if you acquired it, you again would not have entered into it, isn't that true?

"A. I had—

"Q. Just please answer my question 'yes' or 'no', and then explain it if necessary.

"A. Would you restate that question?

(The question was read.)

"A. *I would have entered into it because I had timber to be cut there, and I had a substantial investment in the timber, and I had to have a mill to take care of it.*

"Q. But this transaction at the time you entered into it, you expected, but couldn't predict definitely, would result in a profit to you and the Nagels, isn't that correct, sir?

"A. Yes, sir.

"Q. From the operation of the concern as a going business, isn't that correct, sir?

"A. I don't know.

"Q. You expected it?

"A. Yes, sir.

"Mr. Romley: That is all." (R. 1730-1734). (Emphasis supplied).

This was the best appellees could do. During trial when they examined Maurice Liberman they simply read carefully excerpted portions of the material just quoted into the record (R. 900). It is not enough.

What appellees have apparently considered Maurice Liberman's most damaging admission confirms that he was bargaining to mill his own timber for seven years. This testimony will not support

a finding that *he* was bargaining for future profits. But even if it would, the record is absolutely barren of any indication that appellees were bargaining for future profits. Maurice Liberman knew only that appellees wanted a "position in the forest" in seven years' time (R. 282-283, 329, 383, 397, 446-447, 1838, 1921). What was to be done with the mill after purchase, whose timber was to be milled, and by whom—all these and many other key questions were either not discussed or undecided (R. 283-293, 330-338, 361-367, 383-384, 392, 436-439, 795-797, 844-845, 891-898, 935, 958, 1546-1547, 1843-1847, 1853-1854, 1884-1888, 1916-1929). Although the authorities confirm it, appellees must have overlooked that it is what *they* were bargaining for that fixed the limits of appellants' liability.

Susi v. Simonds, 147 Me. 189, 85 A.2d 178 (1951), was an action brought for breach of an option to convey a parcel of real estate to the plaintiff. Defendant apparently did not convey, and plaintiff brought suit for profits he would have made from the use of the property.

"In order, however, for the plaintiff to recover the special damages which he here claims to have suffered beyond what would naturally flow from the breach claimed of such contract, it must affirmatively appear that the special circumstances under which the contract was actually made which gave rise to such damages were communicated by the plaintiff to the defendant and were thus in the contemplation of both parties at the time of making the contract. * * *

"These special damages consist in part at least of profits in the use which the purchaser contemplated making of the property which he did not obtain. But, as the trial judge very pertinently pointed out, it would be impossible for the purchaser to communicate such information to the seller when the purchaser admitted that he had not fully decided himself just what use he would make of the property." (147 Me. 189, 85 A.2d at 179).

In *Hardinger v. Till*, 1 Wash. 2d 335, 96 P.2d 262 (1939), defendants' real estate agent put the following advertisement in the paper:

"A Rare Bargain.

"For someone wanting a home and income. A duplex property on Capitol Hill. * * *"

Plaintiff made a deposit. Defendants sold to someone else. Plaintiff brought an action for damages. The jury found that market value exceeded contract price by \$250. Plaintiff was awarded his deposit and \$250.

"There is no allegation in the complaint of appellant nor was any offer of proof made that either of the respondents had any knowledge of the use which the appellant intended to make of the property. The mere fact that the realtors, who advertised the property indicated that the property had an income feature does not constitute a representation on the part of respondents, who simply authorized the realtors to find a purchaser and give a receipt for earnest money, subject to the approval of respondents, entitling the appellants to recover loss of the rentals. * * * The case at bar is not one of the class in which anticipated profits are recoverable as damages in an action for breach of contract.

"The measure of damages in the case at bar is the difference between the contract price and the reasonable market value of the property at the time of the breach. * * *"
(1 Wash. 2d 335, 96 P.2d at 264).

Special damages in the form of future profits in excess of the difference between \$325,000 and the value of one-half the mill could be awarded only if appellees bargained for them. The evidence will not support a finding that appellees did bargain for them. The District Court erred in finding that they did.

The position in the forest, the chance to bid on Government timber after 1965 (R. 397-398), for which appellees were bargaining specially was not worth \$429,883.40. There is no evidence whatsoever to support such a value; whatever evidence there is, is to the contrary. The value of the position in the forest for which appellees were bargaining was included in Robert Jenkins' best estimate of \$200,000 to \$800,000 as the value of the property which appellees had been prevented from purchasing:

"Mr. Moore: You considered the \$500,000 offer that Mr. Gallagher made on the mill as a reasonable price for the mill, considering its *position*? Did you consider the \$500,000 price Gallagher made to you for the mill as a reasonable price for the mill, *considering its position with the forest*?"

"Mr. Jenkins: For the mill and its *position*, yes, sir. (R. 439). (Emphasis supplied).

"Mr. Moore: Did I understand you a moment ago—I thought I understood you clearly, as of August, 1958, \$500,000 was a reasonable price or reasonable value for the mill, considering its physical condition, equipment and *position*?"

"Mr. Jenkins: Yes, sir, it was a reasonable price. \$200,000 would have been a reasonable price also or possibly \$800,000. We never had made a complete appraisal as to actually what it would have been worth to us." (R. 440-441). (Emphasis supplied).

"Mr. Moore: As far as *position* is concerned, you knew all at that time about it that you know now about it, don't you?"

"Mr. Jenkins: As far as *position* is concerned, yes, sir.

"Q. Now, with that knowledge was \$500,000 a reasonable value for that mill in August, 1958, considering its *position* in the forest?"

"A. Yes, sir." (R. 441-442). (Emphasis supplied).

The District Court clearly erred in awarding appellees special damages in the amount of \$429,883.40.

(8) The District Court Erred in Computing the Profits It Awarded.

The District Court concluded that appellees were entitled to recover from appellants as damages for appellants' wrongful refusal to allow them to purchase one-half the Winslow mill, the present value of one-half the net profits reasonably certain to have been derived from the operation of the mill by appellees and appellants. It found the present value of such profits to be \$429,883.40. It computed the present value of such profits:

(1) By multiplying all the private timber appellants *actually* owned in the Winslow area, in thousands of board feet, by \$3.00, a profit figure per thousand board feet taken from appellants' milling contract with the prior owners (Amended Findings of Fact, Paragraph 19 (R. 192-194); Memorandum Ruling on Post-Trial Motions (R. 196-197); Exhibit 5 (R. 1424-1433)).

(2) By multiplying by \$4.71 per thousand board feet all the timber appellants had *actually* received when the prior owners of the mill had assigned to appellants all the private timber they *actually* owned and all their rights, at cost, under *existing* contracts to cut government timber. (Amended Findings of Fact, Paragraph 19 (R. 192-194)). \$4.71 was a figure developed by the District Court from the sharply conflicting evidence concerning an appropriate profit for milling one thousand board feet of timber. (Memorandum Ruling on Post-Trial Motions (R. 196-198)). This record supports a finding that \$4.71 is a fair profit per thousand *so long as* the Winslow mill is operated at or near the capacity for which it was designed, 30,000,000 board feet per year.

(3) By multiplying by \$4.71 per thousand 155,485,000 board feet of "Future Forest Service Timber," which the District Court assumed the Winslow mill would purchase during the fifteen years, 1959 through 1973. (Amended Findings of Fact, Paragraph 19 (R. 192-194)). This timber was, in fact, government-owned timber, not under contract to anyone, which might or might not come onto the market during the 1959-1973 period, depending upon future Forest Service policy, fire, and the activities of tree-destroying pests. If this timber ever reached market, the Winslow mill might or might not be successful in purchasing it, for federal law required that it be sold to the highest bidder (C.F.R. §§ 221.8, 221.10) (R. 465-466, 469, 488). This might have been anyone (R. 483).

(4) By spreading these estimated milling profits over a fifteen-year period stretching from 1959 through 1973, on the assumption that the Winslow mill would be used to mill 30,000,000 board feet annually from 1959 through 1963 and less thereafter. In the

court's projection, estimated timber to be processed was then decreased steadily until, in 1969, it reached a low 10,443,000 board feet annually, the figure used for the final five years of the fifteen-year projection. To sustain even this projected level of operation "Future Forest Service Timber" figured in the calculation for fourteen of the fifteen years for which estimated profits were projected. (Amended Findings of Fact, Paragraph 19 (R. 192-194)).

(5) By dividing in half the profit estimated for each of the fifteen years, since appellees would only have been half owners of the mill. (Amended Findings of Fact, Paragraph 19 (R. 192-194)).

(6) By discounting one-half the estimated profits at 4%, purportedly to adjust them to present value. (Amended Findings of Fact, Paragraph 19 (R. 192-194)).

(7) By subtracting from one-half the total discounted estimated profits the present value of 6% interest payable on the purchase price of one-half the mill. (Amended Findings of Fact, Paragraph 19 (R. 192-194)).

This complicated computation is clearly erroneous in several respects. *First*, because profits projected from the milling of "Future Forest Service Timber" are speculative and hypothetical.

When anticipated profits are to be awarded as damages for breach of contract they must be demonstrated with reasonable certainty. *Isenberg v. Lemon*, 84 Ariz. 340, 327 P.2d 1016, 1023, *modified*, 84 Ariz. 364, 329 P.2d 882 (1958); *Jacob v. Miner*, 67 Ariz. 109, 191 P.2d 734, 738 (1948); *Martin v. LaFon*, 55 Ariz. 196, 100 P.2d 182, 183 (1940). An award for loss of profits based on future performance which is speculative and hypothetical must be set aside. *Peters v. Lines*, 275 F.2d 919, 931 (9th Cir. 1960).

Only 111,080,000 of the 266,565,000 board feet of timber employed by the District Court in its fifteen-year projection were actually owned or controlled by appellants. \$287,234.25, the bulk of appellees' bloated \$429,883.40 award, was attributable to

profits the District Court found appellees would have earned from milling 155,485,000 board feet of "Future Forest Service Timber" in the Winslow mill between 1960 and 1973 (Amended Findings of Fact, Paragraph 19 (R. 192-194)).

It is clear that it is contrary to lumber industry practice to consider as reasonably certain profits to be earned from milling timber not under firm contract (R. 138-140, 1036-1037).^{*} Appellees, themselves, depreciated their fixed plant assets only over the timber they had under firm contract at the time the assets were acquired (R. 1238-1242). This is especially true when Forest Service timber is involved. The Forest Service will not guarantee to provide timber for any mill unless there is a sustained yield unit (36 C.F.R. § 221.4), and there was none here (R. 308, 660-661, 1865). The Forest Service could not lawfully guarantee the Winslow mill timber (See Exhibit 21 (R. 1734)). It was required by statute to sell whatever timber it might choose to sell on a competitive bidding basis (36 C.F.R. § 221.8, 221.10) (R. 139, 483). And, unlike a private timber seller who will sell what remains of his initial timber supply after a fire or other disaster, the government will reduce or eliminate any expected allowable cut in one area when there has been a fire in another (R. 139-140, 475, 479, 489, 662-663). There is no pressure on the government to realize an investment in timber properties (36 C.F.R. §§ 221.1, 221.2, 221.3).

In addition, it was not only highly speculative that this "Future Forest Service Timber" would ever be marketed, it was even more speculative to assume that the Winslow mill would buy it. That new, unexpected, and more efficient bidders appear at timber sales far from their prior base of operations and sometimes even build new and more efficient mills in the bailiwicks of complacent existing mills is confirmed not only by general experience in the lumber industry (R. 138-140, 1036-1037), but by the facts of this case.

^{*}Even timber under firm contract is in large measure a speculative and hypothetical figure. Appellants were granted cutting rights over an additional two sections of timber land to make up deficiencies in the purchase of only 62,000,000 board feet (R. 733).

Maurice Liberman bought a large block of timber in Winslow, far from Albuquerque, because the price was right. Appellees operated as the only mill in Winslow from 1942 until 1950, when the prior owners built the mill involved in this proceeding (R. 264-267), and appellees and the prior owners feared Maurice Liberman would build a third mill in Winslow in 1955 (R.1463-1466). The District Court erred in awarding profits by blandly assuming that the same things would not happen again. Moreover, there were other mills already nearby (R. 482-484, 735-736, 1081).

In any case, not only Forest Service regulations and lumber industry practice, but clear controlling legal authority requires that the award of profits to be earned from milling "Future Forest Service Timber" be set aside as speculative and hypothetical. In *Peters v. Lines*, 275 F.2d 919, 931 (9th Cir. 1960), an award for loss of \$477,750.99 in future profits allegedly to have been earned by delivering 2,272,732 board feet of timber per month for 91 months at a profit of \$2.31 per thousand was set aside by this Court because at the time of appellant's breach appellee owned at most between 60,000,000, and 80,000,000 board feet deliverable to appellant and "no evidence was received that [appellee] had in the form of options or otherwise or could have acquired additional timber in the immediate area." (275 F.2d at 931). There was other timber in the area which the parties contemplated appellee would acquire, but this Court held that that timber must be disregarded in computing lost future profits (275 F.2d at 929, 931).

The question presented in *Peters v. Lines* was the exact question appellants raise here, for appellees' evidence shows only that there was other timber in the area which the Winslow mill might acquire (R. 461-498, 707). In *Peters* a logging company had agreed to furnish and a milling company to purchase all the timber milling company would require to operate its mills for a ten-year period in a specified logging area. Logging company did not have sufficient timber under contract at the time of making the requirements contract to supply all milling company's expected needs,

and it was "clear that the contract contemplated acquisitions of additional timber by [logging company] in the Redwood Creek Ranch area in addition to its holdings in such area at the time of the execution of the contract." (275 F.2d at 929). After performing for 29 months of the 120-month contract, milling company refused to receive any more logs from logging company. Logging company thereafter filed a voluntary petition in bankruptcy, and the referee awarded the trustee affirmative relief against milling company based upon milling company's failure to perform under the requirements contract. Of this award, \$477,750.99 was computed by the referee to be attributable to "loss of profits based on future performance." (275 F.2d at 931). "[T]he referee found that as a direct result of the acts of [milling company] the bankrupt was prevented from delivering logs for the remaining term specified in the agreement, causing damage to the bankrupt in the amount stated. The referee found that the price structure specified in the contract gave the bankrupt a \$2.31 per 1,000 board feet price advantage, and projected this figure over the balance of 91 months of the contract, assuming an average monthly delivery of 2,272,732 feet." (275 F.2d at 931). The District Court affirmed the referee's award and milling company appealed, contending that profits expected to be earned from timber not under contract were speculative and hypothetical, *even though* "the contract contemplated additional acquisitions of timber in that area by bankrupt." (275 F.2d at 929). This Court found an arithmetic error in the referee's projection of future profits approved by the District Court and then held an award of profits projected from timber not under contract erroneous as a matter of law:

"Irrespective, however, of such [arithmetic] error, the evidence is insufficient to justify such award. The maximum timber in the Redwood Creek Ranch area owned by the bankrupt at the time of the breach by appellants was 200 million board feet. No evidence was received that bankrupt had in the form of options or otherwise acquired or could have acquired additional timber in the Redwood Creek Ranch

area. Furthermore, the evidence is clear that only about 40 per cent of the remaining timber owned by bankrupt would be deliverable or delivered to the appellants. Such factors were not reflected in the computations apparently made by the referee. The result is that here again the award is speculative and hypothetical." (275 F.2d at 931).

This Court remanded that cause to the District Court for the Northern District of California for appropriate proceedings to redetermine the issue of damages in accordance with the language cited. (275 F.2d at 931). Appellants here request this Court to remand this cause to the District Court for the District of Arizona for appropriate proceedings to redetermine the issue of damages in accordance with the controlling language just cited. Simply eliminating "Future Forest Service Timber" in appellees stretched-out projection would reduce the award to \$142,649.15.

Second, the District Court's award of \$429,883.40 as the present value of the profits appellees would have earned is speculative and hypothetical because the projection on which the award was based stretched fifteen years into the future. Even if appellants had had the hypothetical 155,485,000 board feet of "Future Forest Service Timber" under firm contract, fifteen years was manifestly too long a period to project profits into the future.

Fifteen years was an arbitrary period selected by the District Court at appellees' urging. There was no substantial evidence of record to support it as a likely period on which to base a projection of future profits (R. 419-421, 548-551). It was not as if the parties had agreed to operate for a fixed term of fifteen years; they had not agreed to operate at all (R. 392, 438, 844-845, 882-885, 897-898, 1884-1888, 1928-1929). But, even if they had, fifteen years would have been too long a period over which to guess at profits. Too many fires, technological changes, and other unforeseen events were bound to occur to make profits projected over such a long period anything but hypothetical and

speculative (R. 743-755, 763-765). And, in any case, the evidence is clear that appellants were interested in the Winslow mill only for seven years. After that time appellees were interested in owning the mill, not to operate it, but to shut it down and eliminate it as a competitor (R. 282-283, 329, 382-383, 397, 446-447, 792, 861-862, 1838, 1921).

The cases do not sanction so lengthy a projection. In *Palmer v. Connecticut Ry. & L. Co.* 311 U.S. 544 (1941), petitioners defaulted on a 999-year lease when the unexpired term was 969 years. Respondents purported to show net profits anticipated during the next 40 years. The Court of Appeals projected anticipated profits only for an eleven-year period, three years of which had passed at the time of trial. And, in *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941), lessors were awarded net profits projected only over ten years of the unexpired 67 years of a 99 year lease, although at trial they had made a showing of profits expected to be earned during the next 30 years. Their request that the ten-year projection be extended for an additional five years was rejected by the Court of Appeals, and one must be more certain to receive rent than to receive profits from a lumber mill.

The District Court's computation of the present value of the profits appellees would have earned as owners of one-half the Winslow mill is erroneous, *third*, because no adjustment was made to reflect the increased operating cost per thousand board feet milled which would necessarily result as production was decreased from 30,000,000 to as low as 10,443,000 board feet annually over the fifteen year projection. (Memorandum Ruling on Post-trial Motions (R. 197-198)).

Appellees were bargaining to decrease the competition for government-owned timber after all the privately-owned timber in the Winslow area was cut. They stated again and again that that was what they wanted (R. 329, 383, 397, 446, 1838-1839, 1850, 1921). They needed that timber, they said, to make their mill "a paying operation" after 1965 (R. 283).

The District Court found that appellees' mill and the Winslow mill were "substantially identical. Their timber sources, physical plants, costs of production, quantity, quality and type of product were substantially the same." (Amended Findings of Fact, Paragraph 8 (R. 185); (R. 268, 418, 460)). If appellees could not make their own mill a "paying operation" at an annual level of production of only 10,443,000 board feet, how could appellants earn \$4.71 per thousand in their substantially identical plant while milling only 10,443,000 board feet annually?

Fixed costs per unit of production must be less when a large industrial plant is operated at full design capacity. This is true in the lumber mill industry, as elsewhere (R. 138-143, 792, 836-837, 1033-1034, 1401-1409, 1896). For ten of the fifteen years employed by the District Court to project anticipated profits, the Winslow mill would be operated at 50% to 30% of design capacity. Yet, the District Court made no adjustment in its profit per thousand to reflect the increased unit cost resulting from this decrease in production. This also was contrary to the evidence and manifest error.

CONCLUSION

For the foregoing reasons, the judgement should be reversed and the case remanded either with directions to enter judgment for appellants or for new trial.

Dated: May 4, 1962.

Respectfully submitted,

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(Appendix Follows)

Pursuant to subdivision 2 (f) of Rule 18 of the Rules of this Court, the following reference is made to exhibits a part of this record:

Appellees' exhibits are identified by numbers, appellants' by letters.

The parties have stipulated and this Court has ordered that only some exhibits need be printed and that this Court may consider the others in their original form (R. 1962).

All references are to pages of the printed record.

Plaintiffs' Exhibit No.	Description	Identified	Offered	Received or Rejected	Reproduced in the Printed Record
1	Letter from T. P. Gallagher to Maurice Liberman, September 12, 1958.	249-250	250	250	1414
2	Photostat of telegram from Mrs. George H. Nagel to Maurice Liberman, October 16, 1958.	250	250	250	1422
3	Letter from Maurice Liberman to Mrs. George H. Nagel, September 23, 1958.	250	250	250	1422
4	Purchase Agreement between Duke City Lumber Company and Arizona Timber Company, November 6, 1958, for purchase of the Winslow mill.	250	251	251	—
5	Letter from Maurice Liberman to T. P. Gallagher, August 9, 1957 and 5 letters attached, representing the milling agreement between Duke City Lumber Company and Arizona Timber Company.	251	252, 257	252, 257	1424
6	Agreement between Duke City Lumber Company and Arizona Timber Company, July 30, 1957, representing the Pooling Agreement.	251	252	252	1433

Plaintiffs' Exhibit No.	Description	Identified	Offered	Received or Rejected	Reproduced in the Printed Record
7 A through 7I, inclusive:	Financial reports of Nagel Lumber and Timber Company, 1952-1959.	259-260	509	510	—
8	Map of Chevelon Working Circle showing Aztec timber.....	497	497	497	—
9	Schedule: Available timber, including timber under contract and Future Forest Service Timber.....	510	617	622	1439
10	Schedule: Plaintiffs' computation of operating profit of Nagel mill before deducting depreciation.....	510	624	624	1440
11	Schedule: Plaintiffs' depreciation of Winslow Mill.....	516	624	626	1441
12	Schedule: Plaintiffs' computation of projected profit from available timber.	516	626	627	1443
13	Schedule: Plaintiffs' computation of production of available timber by years, showing also plaintiffs' computation of the projected profit therefrom.....	516	628, 773	773	1444
14	Deposition of Maurice Liberman, Volume 2.....	588	957	957	1604
15	U & O schedule prepared by Thomas Cavanaugh.....	593	593	595	68-69
16	Schedule: Timber cutting rights acquired by Duke City Lumber Company from Arizona Timber Company.....	596	596	597	70-76
17	Deposition of Maurice Liberman, Volume 1.....	608	957	957	1445
18	Thomas Cavanaugh's computations for timber cutting under Pooling Agreement.	610	—	—	—
19	Copy of original statement prepared for settlement of Pooling Agreement.	610	—	—	—
20	Interest table appearing in Volume 6, Arizona Code, 1939.....	690	691	691	—
21	Notice of sale of block of timber in Chevelon Working Circle.	706	706	707	1734

Appendix

Plaintiffs' Exhibit No.	Description	Identified	Offered	Received or Rejected	the Printed Record
22	Copies of Robin Bishop's letters, November 5, 1959, and November 12, 1959, to Mountain States Telephone Company, and replies.....	929	929	930	—
23	Duke City Lumber Company price list, January 10, 1960.....	1058	—	—	—
24	Letter from James J. Cox, Jr. to Judge Johnson, February 11, 1959.	1387	1387	1388	1737
25	Letter from James J. Cox, Jr. to Judge Johnson, March 9, 1959.	1388	1388	1389	1742
26	Letter from Judge Johnson to James J. Cox, Jr., March 28, 1959.	1388	1388	1389	1743
Defendants' Exhibit No.					
A	Flowsheet showing Nagel Lumber and Timber Company cash requirements for purchase of Winslow mill.....	323	323	324	1745
B	Loan agreement between Nagel Lumber and Timber Company and Valley National Bank.....	314-315	322	323	1747
C	Transcript of telephone conversation between Robert Jenkins and Maurice Liberman, October 10, 1958.....	443-444	444	444	—
D	Map of Chevelon Working Circle.....	718	718	718	—
E	Map of Sitgreaves National Forest.....	722	722	722	—
F	Map of Arizona, indicating lumber mills in the vicinity of Sitgreaves National Forest.....	—	738	739	—
G	Telephone statement from Essex House showing long distance charges of Maurice Liberman, October 16, 1958.....	846	846	846	—
H	Letter from Maurice Liberman to Mrs. George H. Nagel, September 24, 1958.....	847	848	848	1756
I	Quotation for construction of new dry kilns at Winslow mill.	1018	1018	1018	—

Appendix

K	Estimated cost of replacing rolling stock during five-year period at Winslow mill.....	1024	1025	—	
L	Schedule: Profits of Winslow mill, November 6, 1958-March 1, 1960.	1100	1101, 1104	—	
M	Schedule: Timber cut under Pooling Agreement to December 1, 1958, and timber cut by Duke City Lumber Company through March 1, 1959.....	1112	—	—	
N	Same as Plaintiffs' Exhibit 19.....	1117	1117	1117	
O	Schedule: Nagel Lumber and Timber Company depreciation.	1240	1242	1242	
P	Schedule: Defendants' analysis and adjustment of computations shown on Plaintiffs' Exhibit 12.....	1245	1277	1277	1757
Q	Schedule: Defendants' analysis of computations and adjustments shown on Plaintiffs' Exhibit 12.....	1261	1265	1265	1760
R	Annual report of Southwest Lumber Mills for fiscal year ending April 30, 1959.....	1266	1268-1269	1268-1269*	—
S	Annual report of Southwest Lumber Mills for fiscal year ending April 30, 1958.....	1266	1268-1269	1268-1269*	—
T	Annual report of Southwest Lumber Mills for fiscal year ending April 30, 1957.....	1266	1268-1269	1268-1269*	—
U	Annual report of Southwest Lumber Mills for fiscal year ending April 30, 1956.....	1266	1268-1269	1268-1269*	—
W	Summary of annual reports of Southwest Lumber Mills.....	1273	1275	1275	—
X	Analysis of Nagel Lumber and Timber Company, 1959 profits adjusted to reflect situation as it might have existed operating Winslow mill.....	1275	1276	1276	—
Y	Computation of percentage of return on capital.....	1391	1391	1391	—
Z	Deposition of Robin Bishop.....	1391	1391	1391	—
AA	Deposition of Mrs. George H. Nagel.....	1391	1391	1391	1762
AB	Deposition of Robert T. Jenkins.....	1391	1391	1391	1892

No. 17642

In the

United States Court of Appeals

For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK
GREVEY, co-partners, d.b.a. DUKE CITY LUM-
BER COMPANY, and DUKE CITY LUMBER COM-
PANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT
T. JENKINS and GEORGIA MAE JENKINS, gen-
eral partners, and GEORGIA MAE JENKINS,
Trustee for JAMES HENRY NAGEL, limited
partner, d.b.a. NAGEL LUMBER & TIMBER
COMPANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited part-
nership,

Appellees.

Appeal from the United States District Court for the District of Arizona
Honorable JAMES A. WALSH, District Judge

Brief of Appellees

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FRANK H. SCHMID, CLERK

SUBJECT INDEX

	Page
Jurisdiction	1
Prefatory Statement	2
Statement of the Case.....	3
Statement of Facts.....	3
The Issues Involved.....	14
Summary of Argument.....	14
Argument	15
I. The Issue on Liability	15
A. The Contract and Its Terms.....	15
B. Reply to Argument on Liability.....	17
1. Agreement Was Reached in Winslow on September 20 Concerning Purchase and Operation of Mill.....	18
2. There Was a Meeting of Minds.....	24
3. Statute of Frauds Does Not Preclude Recovery.....	27
4. Parol Evidence Rule Is Not Applicable.....	29
5. Contract Not Void for Vagueness.....	29
6. Nagel Did Not Fail to Accept Entire Offer.....	30
II. The Issue on Damages.....	33
A. Measure of Damages.....	34
1. Law Governing Measure of Damages.....	34
2. Profits Were Within Contemplation of Parties.....	34
3. Reply to Argument on Measure of Damages.....	35
(a) Future Profits Not Limited to Difference Between Purchase Price and Market Value.....	35
(b) Profits Were Contemplated.....	36
(c) Measure of Damages for Sale of Real Estate Inap- plicable	38

	Page
B. Computation of Damages.....	39
1. Law Governing Proof of Future Profits.....	39
2. Method of Calculation.....	40
(a) Existence of Market.....	41
(b) Availability of Timber.....	42
(c) Production of Available Timber by Years.....	45
(d) Profit Per Thousand Board Feet of Lumber.....	46
(e) Computation of Profit Per Year and Total Profit....	49
3. Reply to Argument on Computation of Damages.....	49
(a) The District Court Deducted Nagel's Cost of Per- formance	49
(b) \$4.71 Profit Per Thousand Is Proper for Entire Period	51
(c) District Court Properly Considered Future Forest Service Timber	52
(d) Future Profits Properly Projected for Fifteen Years	55
Conclusion	58
Certificate of Conformance.....	59

TABLE OF AUTHORITIES CITED

CASES	Pages
Anvil Mining Co. v. Humble (1894), 153 U.S. 540, 14 Sup. Ct. 876, 38 L.Ed. 814.....	34, 36, 52
Blanchard v. Makinster (Ore. 1931), 137 Or. 58, 1 P.2d 583.....	53
Boyer v. Bowles (1941), 310 Mass. 134, 37 N.E. 2d 489, 493.....	24
Chafin v. Main Island Creek Coal Co. (1920) 85 W. Va. 459, 102 S.E. 291, 293, 11 A.L.R. 657.....	23
Condon v. Arizona Housing Corporation, 63 Ariz. 125, 133, 160 P.2d 342, 346.....	28
Connecticut Ry. & Lighting Co. v. Palmer (CA 2 1940), 109 F.2d 568; aff. 311 U.S. 544, 61 Sup. Ct. 379, 85 L.Ed. 336.....	34, 39, 40, 52, 55, 58
Crone v. Amado, 69 Ariz. 389, 397, 214 P.2d 518, 523.....	29
Crunden-Martin Mfg. Co. v. Christy, 22 Ariz. 254, 196 P. 454, 456	17
Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc. (CA 7 1934), 73 F.2d 725.....	39
Gates v. Arizona Brewing Co., 54 Ariz. 266, 95 P.2d 49.....	23
Hardinger v. Till (1939), 1 Wash. 2d 335, 96 P.2d 262.....	38
Hawkinson v. Johnston (CA 8 1941), 122 F.2d 724, cert. denied, 314 U.S. 694, 62 Sup. Ct. 365, 86 L. Ed. 555.....	40, 56
Jacob v. Miner (1948), 67 Ariz. 109, 191 P.2d 734.....	39
Joseph v. Donover Co. (CA 9, 1958), 261 F.2d 812.....	30, 32, 33
Julian Petroleum Corporation v. Courtney Petroleum Co. (CA 9 1927), 22 F.2d 360.....	39, 40, 53
Kingman Water Company v. United States (CA 9, Ariz.), 253 F.2d 588	29
Martin v. LaFon (1940), 55 Ariz. 196, 100 P.2d 182.....	34, 36, 37, 39, 40, 52
Peters v. Lines (CA 9, 1960), 275 F.2d 919.....	54

	Pages
Shannon v. Shaffer Oil & Refining Co. (CA 10 1931), 51 F.2d 878..	39
Sheldon v. Metro-Goldwyn Pictures Corporation (1940), 309 U.S. 390, 60 Sup. Ct. 681, 84 L.Ed. 825.....	40
Susi v. Simonds (1951), 147 Me. 189, 85 A.2d 178.....	38
Universal Pictures Co., Inc. v. Harold Lloyd Corporation (CA 9 1947), 162 F.2d 354.....	40
Waugh v. Lennard, 69 Ariz. 214, 226-227, 211 P.2d 806, 814 (1949)	28
RULE	
District Court Rule 18(d).....	4, 18
TEXTS	
McCormick on Damages, Sec. 29, p. 109.....	40
Restatement of Contracts:	
Section 207, Comment (a).....	27
Section 331, Comment c, p. 517.....	40
Williston on Contracts, Third Edition, Volume 4, Section 567A, page 22	27

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Appellants,

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T. JENKINS and GEORGIA MAE JENKINS, gen-
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partner, d.b.a. NAGEL LUMBER & TIMBER
COMPANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited part-
nership,

Appellees.

Appeal from the United States District Court for the District of Arizona

Honorable JAMES A. WALSH, District Judge

Brief of Appellees

JURISDICTION

Appellees concur in appellants' statement of jurisdiction.

PREFATORY STATEMENT

Appellees respectfully beg to differ with the "capsule" appearing on page 1 of the Brief for Appellants. These statements are not merely an over-simplification of the issues involved; they in fact misstate the case. Damages were not awarded plaintiff-appellees "for defendant-appellants' refusal to sell them \$250,000 worth of real property for \$325,000.":

"Mr. Enersen: I take it then, your Honor, this award is not made upon the basis of the customary rule for damages for breach of contract to sell real estate?"

"The Court: No. No, it is based on the proposition that there was an agreement, breach of an agreement to engage in a business, as to which profit could be anticipated with a reasonable certainty and the amount of the recovery would be the profit which could with reasonable certainty be anticipated to result had the contract not been breached, but had the parties performed." (R. 100-101)

As a matter of fact, real property is only slightly involved in the transaction.*

*Exhibit 11 (R. 1441) enumerates the property acquired by defendants and the values allocated by defendants to each of the separate items thereof:

Sawmill	\$176,970.00
Planing Mill	127,240.00
Shop	18,780.00
Lumber Shed	12,670.00
Dry Kiln	56,470.00
Office Building and Equipment	3,480.00
Bunkhouse	4,540.00
Carriers and Lift Trucks	59,550.00
Stacking Sticks, Foundations, Spacers and Roof Boards	80,000.00
Camp	5,000.00
Trucks, Trailers, Auto Patrols and Ford Pickup	97,500.00
LAND	7,800.00
Total	<u><u>\$650,000.00</u></u>

STATEMENT OF THE CASE

This appeal is from a judgment awarding damages to plaintiffs-appellees for breach of contract by defendants-appellants. The law applied by the District Court is neither new nor controversial. Plaintiffs had the first right to buy a successful lumber manufacturing business in Winslow, Arizona and were seriously considering its purchase. Defendants wanted to buy it themselves and induced plaintiffs to give up their first right to buy in consideration of (1) an option to allow plaintiffs to purchase a half interest therein at any time prior to April 30, 1959, and (2) an option to purchase defendants' remaining half interest at the end of seven years.

On September 23, 1958 plaintiffs gave up their first right to buy; defendants completed the purchase on November 6, 1958; and on January 6, 1959 defendants refused to allow plaintiffs to exercise their option and acquire a half interest in the business. This breach resulted in the present action. The District Court, presiding without a jury, awarded damages for the loss of profits reasonably certain to have been earned by plaintiffs had the defendants not breached the first option. No damages were sought or allowed on account of the second option.

STATEMENT OF FACTS

Appellees controvert appellants' statement of the case and of the facts. It is inadequate and inaccurate. It fails to inform the Court of the facts upon which the District Court based its judgment.

The District Court made nineteen separately numbered Amended Findings of Fact,* four of which have one or more

*The references in this brief to the Amended Findings of Fact are thus: (Findings 3); to the Brief for Appellants, thus: (Br. 51); to the printed record, thus: (R. 101); and to the exhibits, thus: (Ex. A).

subdivisions (R. 183-196). Only three of the Findings are disputed* on the appeal: Nos. 11, 12(a) and 19.

Since the vast majority of the Findings are not disputed or challenged on this appeal we know of no better or more accurate and concise way to state the facts than to adopt and copy the Findings in our Statement of Facts. As to those which are not disputed or challenged, we merely copy them in haec verba; and as to those which are disputed or challenged, we copy them and cite in parentheses the pages in the Transcript of Record where evidence in support thereof may be found.

We omit the first five Findings which relate only to jurisdiction and the identity and capacity of the parties. The remaining Findings are as follows:

FINDING 6:

At all times herein mentioned plaintiffs were and they now are engaged in the operation of a business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public.

FINDING 7:

On and prior to September 20, 1958, the New Mexico Timber Company, a New Mexico corporation, the Arizona Timber Company, an Arizona corporation, and the Bernalillo Lumber Company, a partnership consisting of A. I. Kaplan and T. P. Gallagher, partners, owned and engaged in the business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal

*These Findings are not challenged separately and particularly, as required by Rule 18(d). The fact that they are disputed is revealed only by a search and study of the brief.

of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public. Said corporations and partnership collectively hereinafter will be referred to as the "Gallagher Companies" and said business enterprise, together with certain physical assets, easements, leases and timber contracts appurtenant thereto, hereinafter will be referred to as the "Gallagher Properties".

FINDING 8:

Prior to September 23, 1958 the Gallagher business operations and the plaintiff's business operations were substantially identical. Their timber sources, physical plants, costs of operation, quantity, quality and type of product were substantially the same.

FINDING 9:

For many years prior to September 20, 1958, plaintiffs and the Gallagher Companies had an agreement whereby, in the event either the plaintiffs or the Gallagher Companies offered for sale either of their respective above described business enterprises, the other party would have the right of first refusal to purchase the business enterprise so offered for sale. During 1958 and shortly prior to September 23, 1958, the Gallagher Companies did offer the Gallagher Properties for sale. Pursuant to said agreement plaintiffs and the Gallagher Companies were actively engaged in negotiations for the purchase of the Gallagher Properties.

FINDING 10:

On September 10, 1958 defendants commenced negotiations for the purchase of the Gallagher Properties. On that day T. P. Gallagher advised defendants that the Gallagher Companies had an existing oral reciprocal first refusal agreement with the plaintiffs and that any sale to defendants would be subject to plaintiffs' first refusal. Thereupon defendants contacted plaintiffs and ar-

ranged for a conference which was held in Winslow, Arizona, on September 20, 1958.

FINDING 11:

At this conference plaintiffs and defendants agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purpose of the Gallagher Properties (R. 296, 387); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 296, 388-389; Ex. 3); that in the event plaintiffs exercised their said option, then the business enterprise herein referred to as the Gallagher Properties thereafter would be jointly owned and operated by plaintiffs and defendants for the purpose and in the expectation of making a profit (R. 337, 1734, 1843-1844, 1846, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly-acquired mill under the terms and at the prices specified in the milling agreement received in evidence as plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918).

FINDING 12:

On September 22, 1958,* defendants prepared the document received in evidence as plaintiffs' Exhibit 3 which the parties signed on September 23, 1958 and reads as follows:

*On this same day, which was two days after the September 20 conference and agreement, Liberman talked by long distance telephone to A. I. Kaplan; and, in response to Liberman's inquiry, Kaplan confirmed that he "had given Tom Gallagher authority to give Mrs. Nagel priority in any sale of the Winslow plant." (R. 49-50).

"September 23, 1958

"Mrs. George H. Nagel
Nagel Lumber & Timber Company
Winslow, Arizona

"Dear Mrs. Nagel:

"It is our understanding that you have a 'first refusal agreement' with Arizona Timber Company to buy out their Plant at Winslow; and, if you turn down this option it is our understanding that we are second in line to buy the Plant.

"It is now mutually agreed that in case either of us (and by this is meant, the companies controlled by the Liberman Group as one party; and the Nagel Lumber and Timber Company or any company controlled by the Nagel Family as the second party) will take-up the proposition made by Arizona Timber Company and buy out the Winslow Plant from them, then our companies will have the option to participate in that purchase on a fifty-fifty basis at the same terms as the purchaser will get from the Arizona Timber Company.

"This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.

"Very truly yours,

MAURICE LIBERMAN

Maurice Liberman

"Liberman Group

by: MAURICE LIBERMAN

"Nagel Family

By: ROBERT T. JENKINS

"ML:rb"

FINDING 12(a):

From the conversations and negotiations of the parties carried on at the meeting of September 20, 1958 and from the language of Exhibit 3 in evidence the plaintiffs understood at the time Exhibit 3 was executed by the parties, and the defendants then knew or had reason to know that the plaintiffs understood from such conversations and negotiations and from the language of Exhibit 3, that plaintiffs and defendants had contracted and agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties (R. 1859-1860, 1923, 1932-1934); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 335-336, 388-389, 1855, 1858, 1926-1927; Ex. 3); that in the event plaintiffs exercised their said option the plaintiffs and defendants, in addition to operating the business would share equally the obligation to provide any capital necessary therefor, as well as share equally the profits and losses of the business (R. 330-332, 337-338, 437-439, 878, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly acquired mill, under the terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918).

FINDING 13:

At the time of the execution of Exhibit 3 by plaintiffs and defendants the business enterprise herein referred to as the

Gallagher Properties was a going business earning and capable of earning substantial profits, which plaintiffs and defendants contemplated said business would continue to earn in the future.

FINDING 14:

On September 23, 1958, plaintiffs released the Gallagher Companies from their first refusal agreement and withdrew from further negotiations with the Gallagher Companies for the purchase of the Gallagher Properties.

FINDING 14(a):

Following protracted negotiations in New York between defendant Maurice Liberman and the owners of the Gallagher Properties an agreement for sale of said Properties was reached on October 16, 1958 at about 2:00 A.M. subject to final approval by both buyers and sellers at 11:00 A.M.

FINDING 14(b):

In the early morning hours of October 16, 1958 plaintiff Mabel J. Nagel received a phone call in Winslow from defendant Liberman in New York. He requested that plaintiffs release defendants from the option agreement and send him a telegram to that effect as soon as possible. She replied that she did not think she would do that but would check with plaintiff Robert T. Jenkins, and she did. At 8:29 A.M. Mrs. Nagel sent Liberman a telegram stating "Do not wish to release options at this time."

FINDING 14(c):

In a later phone call on October 16, 1958, Liberman told Mrs. Nagel the price of the plant and timber but did not reveal that the terms were credit rather than cash. He acknowledged receipt of the aforesaid telegram and asked Mrs. Nagel to come to New York. She replied that she could not come. Plaintiffs did not see or hear from defendants again until mid-November, 1958.

FINDING 14(d):

On October 17, 1958 a tentative draft of the purchase and sale agreement was executed by defendants and the Gallagher Companies.

FINDING 15:

On November 6, 1958, defendants and the Gallagher Companies entered into a written contract whereby the Gallagher Companies agreed to and did sell and the defendants agreed to and did purchase the Gallagher Properties.

FINDING 15(a):

In mid-November, 1958, Jenkins approached Liberman for the purpose of discussing defendants' purchase of the Gallagher Properties. Liberman stated that he would be in Winslow shortly and would get in touch with Jenkins but did not do so on account of illness.

FINDING 15(b):

On December 23, 1958 plaintiffs asked to see the contract for the purpose of deciding whether or not to exercise their option, but defendants refused to allow them to see a copy.

FINDING 16:

On January 6, 1959, plaintiffs for the first time learned the terms of defendants' aforesaid purchase, and on that day they advised defendants they elected to exercise their option to purchase said undivided one-half interest in the Gallagher Properties and offered to pay one-half of the purchase price. At the time of so electing the agreement of September 20, 1958 between plaintiffs and defendants was still in full force and effect, the defendants had not been released from their obligations thereunder,

and plaintiffs had done all things required of them by said agreement. Also, at the time of so electing, the plaintiffs were ready, able and willing to consummate the purchase of said one-half interest.

FINDING 17:

Defendants refused and ever since have refused to allow plaintiffs to exercise such option and acquire said undivided one-half interest.

FINDING 18:

Plaintiffs claim that defendants owed the Gallagher Companies timber (referred to in plaintiffs' Exhibit 9 as "owed by Duke City") from which there would have been a net lumber recovery of 21,217,000 board feet; and they further claim that they are entitled to share in the profits which said 21,217,000 board feet would have produced, computed on the same profit basis as the Gallagher Aztec and the Forest Service timber. The aforesaid timber was standing in the forest and there would have been a net lumber recovery therefrom to the parties of 21,217,000 board feet; it was not "owed by Duke City," but was owned by Duke City; and plaintiffs are entitled to share in the profits which it would have produced, computed on the same profit basis as the Duke City Aztec and not on the same profit basis as the Gallagher Aztec and the Forest Service timber.

FINDING 19:

The present value of one-half of the net profits reasonably certain to have been derived from the operation of the Gallagher Properties by plaintiffs and defendants is the sum of \$429,883.40. If the parties had gone ahead pursuant to the agreement between them:

FINDING 19(a):

The Gallagher Properties would have been operated during the years 1959 to 1973 inclusive, at a joint profit to the parties of \$3.00 per 1,000 board feet as to the Duke City Aztec and of \$4.71 per 1,000 board feet as to the Gallagher Aztec and Forest Service timber (R. 196-200, 291-292, 391-392, 1846-1847, 1918; Ex. 9, 10, 11, 12 and 13).

FINDING 19(b):

There would have been a net lumber recovery to the parties of 71,880,000 board feet from the Duke City Aztec, as to which the parties would have derived a profit of \$3.00 per 1,000 board feet which would have produced a joint profit to the parties of \$215,640.00; and the share of plaintiffs therein would have been one-half of that sum, or \$107,820.00 (R. 70; Ex. 9).

FINDING 19(c):

There would have been a net lumber recovery to the parties of 194,685,000 board feet from what the evidence refers to as Gallagher Aztec and Forest Service timber, as to which the parties reasonably could anticipate a profit of \$4.71 per 1,000 board feet. This would have produced a joint profit to the parties of \$916,966.35; and the share of plaintiffs therein would have been one-half of that sum, or \$458,483.18 (R. 196-200; Ex. 9, 10, 11, 12 and 13).

FINDING 19(d):

Plaintiffs' share of the aforesaid net profits aggregates \$566,303.18; the present value of this sum at the rate of 4% is \$478,633.40 (R. 765-767).

FINDING 19(e):

The interest which plaintiffs would have been required to pay on the purchase price amounts to \$48,750.00. The net damage, therefore, is \$429,883.40 (Ex. 4).

FINDING 19(f):

The damages sustained by plaintiffs are computed as follows:

SCHEDULE SHOWING COMPUTATION BY COURT OF DAMAGES SUSTAINED

		<u>PRODUCTION OF AVAILABLE TIMBER BY YEARS</u>	<u>50% OF PROJECTED PRODUCTION BY YEARS</u> DUKE CITY AZTEC @ \$3.00 ALL OTHER TIMBER @ \$4.00
1959	Duke City Aztec	15,320,000	\$22,980.00
	Existing Forest Service	14,680,000	34,571.40
		30,000,000	
1960	Duke City Aztec	15,000,000	22,500.00
	Existing Forest Service	7,000,000	} 35,325.00
	Future Forest Service	8,000,000	
		30,000,000	
1961	Duke City Aztec	19,830,000	29,745.00
	Future Forest Service	10,170,000	23,950.35
		30,000,000	
1962	Duke City Aztec	17,350,000	26,025.00
	Future Forest Service	12,650,000	29,790.75
		30,000,000	
1963	Duke City Aztec	4,380,000	6,570.00
	Gallagher Aztec	13,545,000	} 60,335.10
	Future Forest Service	12,075,000	
		30,000,000	
1964	Gallagher Aztec	3,975,000	
	Future Forest Service	12,075,000	
		16,050,000	
1965	Future Forest Service	12,075,000	
1966	Future Forest Service	12,075,000	
1967	Future Forest Service	12,075,000	
1968	Future Forest Service	12,075,000	
1969	Future Forest Service	10,443,000	
1970	Future Forest Service	10,443,000	
1971	Future Forest Service	10,443,000	
1972	Future Forest Service	10,443,000	
1973	Future Forest Service	10,443,000	
		<u>266,565,000</u>	<u>\$56,315,000</u>

EXISTING TIMBER—NET LUMBER RECOVERY

<u>DUKE CITY AZTEC</u>	<u>GALLAGHER AZTEC</u>	<u>FOREST SERVICE</u>	<u>TOTAL</u>
15,320,000	13,545,000	14,680,000	
15,000,000	3,975,000	7,000,000	
19,830,000			
17,350,000			
4,380,000			
<u>71,880,000</u>	<u>17,520,000</u>	<u>21,680,000</u>	111,080,000

FUTURE TIMBER—NET LUMBER RECOVERY

Forest Service Contract to be awarded 5/31/60 and to be cut by 5/31/62	30,820,000	
Forest Service Contracts to be awarded and to be cut in years 1963 to 1973 inclusive	124,665,000	155,485,000
TOTAL		<u>266,565,000</u>

Total Damages
Reduced by
Minus Present Value
Computed
TOTAL Damages
Sustained

THE ISSUES INVOLVED

1. Does the evidence support the Finding and Conclusion that the parties made a contract?
2. Did the District Court correctly rule that loss of future profits is the proper measure of damages?
3. Does the evidence support the Finding of the District Court that the present value of the future profits reasonably certain to have been earned by plaintiffs is the sum of \$429,883.40?

SUMMARY OF ARGUMENT

1. The parties entered into a valid, lawful contract whereby appellees were granted an option until April 30, 1959 to purchase from appellants an undivided one-half interest in the Gallagher Properties in the event of their acquisition by appellants. Appellants' contentions to the contrary are each without merit.
2. The measure of damages for breach of an option allowing a party to acquire an interest in a going business is the amount of future profits reasonably certain to be earned therefrom, where the prospective gains or profits were within the contemplation of the parties and an immediate and direct inducement to the contract.
3. The evidence supports the Finding of the District Court in applying the above measure of damages for the reason that future profits were within the contemplation of the parties and an immediate and direct inducement to the contract.
4. Appellants' argument that recovery for loss of profits is limited to the difference between \$325,000 and one-half of the fair market value of the mill is without merit.
5. Where loss of profits is the proper measure of damages the evidence need only show with reasonable certainty what the profits would have been.

6. The District Court properly determined the amount of plaintiffs' damages by taking into consideration the existence of a market for lumber which will permit continued realization of profits; the availability of timber for manufacture into lumber; and then calculating the amount of net profit which would have been earned by appellees after deducting appellees' cost of performance.

7. Appellants' attack upon the method used by the District Court to compute damages is without merit. The District Court deducted Nagel's entire cost of performance. A net profit of \$4.71 per thousand board feet is applicable even after production drops below 30 million board feet per year. The District Court properly took into consideration timber not actually under contract and properly projected the profits for a period of 15 years.

ARGUMENT

The questions raised on the appeal, with respect to both liability and damages, involve issues of fact which appellants claim are not sustained by the evidence. Under these circumstances appellants are required to demonstrate that there is no substantial evidence to support the challenged findings and to set forth in their brief all of the material evidence on the questions and not merely their own evidence.

I. The Issue on Liability.

A. THE CONTRACT AND ITS TERMS.

The District Court found and concluded that the parties entered into a valid, lawful contract (R. 195). This determination was based upon the evidence, particularly Findings 11 and 12(a). For convenience and clarity we here quote these Findings verbatim and cite in parentheses the pages in the Transcript of Record where evidence in support thereof may be found.

At this conference [September 20 in Winslow] plaintiffs and defendants agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties (R. 296, 387); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 296, 388-389; Ex. 3); that in the event plaintiffs exercised their said option, then the business enterprise herein referred to as the Gallagher Properties thereafter would be jointly owned and operated by plaintiffs and defendants for the purpose and in the expectation of making a profit (R. 337, 1734, 1843-1844, 1846, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly-acquired mill under the terms and at the prices specified in the milling agreement received in evidence as plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918) (Finding 11).

From the conversations and negotiations of the parties carried on at the meeting of September 20, 1958 and from the language of Exhibit 3 in evidence the plaintiffs understood at the time Exhibit 3 was executed by the parties, and the defendants then knew or had reason to know that the plaintiffs understood from such conversations and negotiations and from the language of Exhibit 3 that plaintiffs and defendants had contracted and agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties (R. 1859-1860, 1923, 1932-

1934); that defendants would then proceed to negotiate a purchase thereof (R. 296, 388); that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase (R. 335-336, 388-389, 1855, 1858, 1926-1927; Ex. 3); that in the event plaintiffs exercised their said option the plaintiffs and defendants, in addition to operating the business would share equally the obligation to provide any capital necessary therefor, as well as share equally the profits and losses of the business (R. 330-332, 337-338, 437-439, 878, 1921); and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly acquired mill, under the terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5 (R. 291-292, 391-392, 1846-1847, 1918) (Finding 12(a)).

The above findings contain all the necessary elements of a valid, lawful contract; and for breach thereof appellants are liable. As the Arizona Supreme Court in *Crunden-Martin Mfg. Co. v. Christy*, 22 Ariz. 254, 196 P. 454, 456, aptly stated:

"* * * the rule of law, as well as ethics, is that a party will be held to that meaning which he knew the other party to the contract supposed his words to bear if his language may be understood in more senses than one. In other words, whatever is expected by one party to a contract and known to be so expected by the other is to be deemed a part or condition of the contract. * * *"

B. REPLY TO ARGUMENT ON LIABILITY.

Appellants' Contentions Summarized

Appellants' contentions that they are not liable for breach of contract are all aimed at one proposition: that there was no

lawful, binding contract entered into between the parties. In their Answer to Amended Complaint (R. 39), and during the trial of this action appellants acknowledged the existence of a contract,* but urged adoption of their version of its terms. The District Court refused to accept appellants' version. Since this involved the resolution of conflicting issues of fact, appellants' version of the contract is not involved upon appeal. They now contend that there was no contract at all.

It is interesting to note that appellants did not file a motion for a new trial as to all issues. They filed only a Motion for New Trial as to Damages Alone (R. 135). It also is noteworthy that no error is assigned with respect to rulings on evidence.

Appellants have totally failed to comply with Rule 18(d) of this Court which provides that "In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous." A reading of the argument concerning liability reveals that under Specifications 1 and 2 appellants attack the judgment of the District Court in six respects:

- No agreement was reached on September 20 in Winslow.
- The minds of the parties did not meet.
- The Statute of Frauds precludes recovery.
- The parol evidence rule was violated.
- The contract was void for vagueness.
- Nagel failed to accept entire offer.

1. Agreement Was Reached in Winslow on September 20 Concerning Purchase and Operation of Mill.

Specific Terms of Agreement

The conference took place in the Nagel office in Winslow on September 20, 1958. The only persons present were Maurice

*See excerpts from Liberman's testimony, *infra*, pages 20-22.

Liberman, Mrs. George H. Nagel and Robert T. Jenkins. The conference lasted some two or three hours (R. 278-280, 326). It did not just happen. Liberman called Mrs. Nagel by long distance and requested the appointment. He chartered a plane and flew there from Albuquerque (R. 379, 873).

Notwithstanding the contention made by appellants (Br. 10), *all parties* present testified that they did reach an agreement at the conference concerning the purchase and operation of the mill.

Robert Jenkins testified:

Nagel wanted the whole plant at the time Liberman suggested they buy it together (R. 382). Liberman said "* * * if we buy it together we will mill it all together, put it all in the mill" (R. 1918). He knew of Nagel's first refusal agreement and said "You have got to turn him down before I can make a deal with him"; Nagel was to refuse to buy it so Liberman would have a free rein to make a deal (R. 1923). Nagel would then tell Gallagher that it would not purchase the plant, Liberman then would purchase the plant if at all possible, when his deal was completed Nagel would have an option of purchasing in his deal on a fifty-fifty basis, at the end of seven years Liberman would sell to Nagel, however, Nagel had no obligation to buy the plant at the end of seven years nor to buy on a fifty-fifty basis (R. 388). Thus, Nagel had two options. Liberman also said that at the end of seven years "He would sell us his remaining half interest in the plant, if he purchased it and our original fifty-fifty deal was consummated" (R. 396, 1918); Liberman said Nagel could have "until April 30th to exercise this option to purchase into his deal" (R. 389, 449, 1926-1927). This date was suggested because until then Nagel's money would be tied up in logs and lumber inventories; its money would be more readily available by then; and Liberman readily agreed (R. 388-389). Liberman said that a

profit of \$2 per thousand for milling his Aztec timber was too cheap, and he said "that \$3 would be a reasonable amount" (R. 390). He also said "I have a contract for Three Dollars and I don't see why it should be changed" (R. 1918). He was speaking of his milling agreement with Gallagher under which his Aztec timber was being milled.

Mrs. Nagel testified:

Mr. Liberman said "Let's buy the mill together" (R. 282, 319, 1838). He asked Nagel to call Gallagher and tell him Nagel was not going to buy the mill (R. 296, 1840). He further stated: "I will buy the mill and I will give you an option agreement to buy one-half in the mill and the timber" (R. 296). He said Nagel could have until April 30, 1959 to "complete our purchase and buy in" (R. 283-284, 296).

The parties discussed the price of the mill and timber (R. 288) and the amount of Forest Service Timber and Aztec timber available (R. 289, 330). The timber would be owned fifty-fifty if the purchase was made (R. 331). Nagel would withdraw from the deal, Liberman would buy the plant and the timber, Nagel would have an option to buy in on a fifty-fifty basis at exactly the same terms and conditions of Liberman's purchase, and the option would remain in force until April 30, 1959 (R. 337-338). Jenkins would manage the mill (R. 287).

Liberman recognized that the parties reached an agreement on September 20, 1958. We quote him *verbatim*:

"Q. You flew there, chartered a plane and flew there for that one purpose of seeing her, and that is all you did do on that trip, see her and Bob, have your discussion and reach an agreement, is that right?

A. Yes (R. 1560).

A. * * * we got to a conclusion, both parties, that the best thing was for us to buy the plant together (R. 1539).

- Q. You made an agreement with Mrs. Nagel on September 20th about which you have testified?
- A. Yes, sir (R. 1726).
- Q. Well, you did reach an agreement there on that day?
- A. That's right (R. 1550). See, also: 890-891.
- Q. Didn't you tell us a while ago that you reached an agreement there that day?
- A. Yes (R. 1571).
- A. Well, we had an agreement, I had an agreement with Mrs. Nagel (R. 1598).
- A. * * * I had an agreement with Mrs. Nagel, this was before I left (R. 1550).
- Q. After these other discussions then did you agree to purchase the plant and timber together?
- A. Yes, sir (R. 881).
- Q. And the writing up was merely evidence of the agreement you reached at her office, was that right?
- A. That's right.
- Q. You already had your agreement when you left?
- A. That's right.
- Q. In fact, shook hands on it?
- A. That's right.
- Q. So you had your agreement when you left, and it was just a question of putting it down in writing afterwards, is that right?
- A. That's right" (R. 1551).

In view of Liberman's admissions it is difficult to comprehend how appellants can seriously urge that no agreement was reached on September 20.

Liberman also testified with respect to Nagel's obligation under the agreement:

- "Q. All right, the three of you, then, Mrs. Nagel and Bob Jenkins, in that conference in her office on September 20 agreed that Bob Jenkins would go and tell Gallagher

that the Nagel Company was not going to exercise its right of first refusal, is that right?

A. That's right.

Q. And it was agreed at that time that that would be done in order to pave the way for you to renew negotiations with Tom Gallagher, is that right?

A. To renew, yes" (R. 1554).

As to Liberman's next move, he testified as follows:

"Q. And what was said about when you would renew negotiations?

A. As Gallagher will permit, as soon as I could get hold of Gallagher.

Q. As soon as Bob Jenkins told Gallagher that the Nagel Company was giving up its right of first refusal, you were to go in and try to purchase the Gallagher Properties, is that right?

A. That I would go and try to see Gallagher.

Q. You just weren't going to see him, you were going to try to purchase the property, weren't you?

A. To get a proposal from him.

Q. And then it was the intention of everyone present that all three of you move as fast as you could, is that right?

A. Yes (R. 1554).

Q. Similarly, this question of Duke City buying it alone was completely behind you, and Duke City was not going to buy alone, that is right, isn't it?"

A. That is right" (R. 1568).

And, with respect to the April 30, 1959 option date, Liberman said:

"Q. (By Mr. Romley): Now, was there anything said in the September 20 meeting with regard to the option continuing beyond April 30?

A. No, sir.

Q. The only mention made with regard to the length of the time the option would continue was to April 30th of 1959, is that right?

A. Yes, sir" (R. 904).

Implied Terms of Agreement

Implied terms are as much a part of a contract as written ones. *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 95 P.2d 49. Even if the record were lacking in evidence with respect thereto, and it is not, the following terms would be implied in an agreement between two parties to purchase a going business on a fifty-fifty basis in the expectation of making a profit:

- that they would operate the business, and not shut it down or let it lie idle;
- that they would advance fifty-fifty the financing and necessary capital to operate the business;
- that they would provide management for the business;
- that they would pay reasonable salaries and expenses.

All parties spoke of Nagel's "fifty-fifty" option. The evidence shows what they meant by that term. Even if all that was said was that Nagel had an option to acquire a "fifty-fifty" interest in the purchase of a going concern, that would have been sufficient.

The basic rule of interpretation of contracts has been stated as follows, in *Chafin v. Main Island Creek Coal Co.* (1920) 85 W. Va. 459, 102 S.E. 291, 293, 11 A.L.R. 657:

"* * * The object of construction of contracts is to give effect to the agreement of the parties, so far as it can be ascertained from the language used, and it matters not that the agreement may be expressed in the vernacular of the street. * * *"

In *Chafin* the court had before it the issue of the definiteness of the term "50-50": It held (102 S.E. at 293):

"* * * That this expression has a well-defined meaning cannot be doubted. It conveys to the mind immediately the division of the subject of discussion into halves, and we are not willing to admit that we are so ignorant of terms in

common usage as not to know the meaning of this phrase.
* * *

In *Boyer v. Bowles* (1941), 310 Mass. 134, 37 N.E. 2d 489, 493, the court had before it the question of an agreement between two alleged partners to "go 50-50". In upholding the agreement the court stated:

"* * * The importance of the agreement 'to go 50-50' cannot be overlooked. It is true that there is no reported fact that these words have acquired a fixed meaning in business transactions, but we think that it is good sense to understand the words as meaning the division into halves of something that was under discussion by the parties at the time. In our effort to give effect to the agreement of the parties, so far as it can be ascertained from the language used, it is not necessarily an insuperable obstacle that some part of the agreement may be expressed in the vernacular of the street. See *Chafin v. Main Island Creek Coal Co.*, 85 W. Va. 459, 463, 102 S.E. 291, 11 A.L.R. 657, 661; *Dunn v. Gilbert*, 36 Wyo. 249, 256, 254 P. 121. We construe this expression, 'to go 50-50', to mean that the parties in question agreed that they were to be equally interested in the partnership business."

Although it is true that all details of the operation were not fully worked out, there can be no real doubt that both parties understood the agreement as being one of equal participation in the ownership, operation, costs, and profits or losses of the Gallagher mill. After gaining their desired consideration appellants cannot breach with impunity the mutually understood and accepted terms of the option agreement, simply because all of the details had not been worked out.

2. There Was a Meeting of Minds.

Plaintiffs and defendants testified to statements made in the course of the September 20 meeting. Each party testified that the

other expressly assented to the interpretation of the option agreement insisted upon by that party at the trial. The minds of the parties met upon one version or the other. The problem was resolved when the District Court determined that appellees told the truth and that their version was correct (Findings of Fact Nos. 11 and 12(a)).

Appellants' confusion may be due in part to their assumption that the District Court concluded that the agreement was made in Albuquerque and is contained in the September 23 letter. The agreement was entered into in Winslow on September 20. The letter is merely a memorandum or some evidence thereof; its purpose, as Jenkins testified, was merely to "commemorate" the agreement reached September 20 (R. 431).

The argument seems to be that the minds of the parties did not meet because appellees testified the option was to continue until April 30, 1959 whereas, appellants contend, as written and as intended by Liberman it would be "open forever" unless cancelled by mutual consent (Br. 16).

The exact language in question appears in the last paragraph of Exhibit 3 (R. 1423):

~~"This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent."~~

If it were intended that the option would be open forever, the words marked out below would not have been written:

"This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.",

and the option would have read:

"This option remains in force until cancelled by mutual consent."

An option which is not in perpetuity would not recite that it is for a term ending on a specified date; it would not recite that it would be "automatically extended"; and for certain it would not be automatically extended "for six month periods". It is patent that there is an ambiguity in the language Liberman used in the September 23 letter.

Appellants now argue there is no ambiguity. This was not their position in the District Court. At the pretrial conference when the court stated "to me there is some ambiguity about the agreement", counsel for appellants frankly said: "There is to all of us" (R. 233). At the trial the court, undoubtedly having in mind what counsel for appellants had acknowledged at the pretrial conference, said:

"* * * I don't think there is any question that counsel will agree there were ambiguities in it, or matters that you just can't pick up by reading, and understand what the parties meant by the words they used." (R. 281)

No one intended an option in perpetuity, not even Liberman, the argument of his appellate counsel to the contrary notwithstanding.

James Cox testified with regard to a conference in Albuquerque on January 6, 1959 in the office of Liberman's Albuquerque attorney, in referring to the language used by Liberman in the "letter agreement" for periods after April 30:

"And I said, 'Maurice, did you intend that this go on in perpetuity?' And he said, 'No, what I meant was that if either party wanted to cancel it, that they could cancel it'" (R. 1398).

Cox' testimony was denied neither by Liberman nor his Albuquerque attorney who was a witness at the trial. Appellants charge that Cox testified that "cancelled by mutual consent means cancelled by unilateral action, i.e., without mutual consent" (Br.

18). Cox did not so testify; he was quoting Liberman. Appellants' record citation does not bear them out.

The September 23 letter was prepared by Liberman before Jenkins arrived (R. 394). Jenkins and Dale Nelson, Nagel's comptroller, discussed it *in Liberman's presence* and said they did not see that it affected them or that there was anything that could "hurt" them (R. 1932-1933). It had already been signed by Liberman (R. 1933). Jenkins then testified:

"Q. Did you have any discussion at all with Mr. Liberman about it that day in his office?

A. About this agreement?

Q. Yes.

A. No, sir, just that in essence it was what we had agreed and that there was a change or two, but we didn't see that it affected us in any way, so we were willing to go ahead *in full confidence.*" (R. 1934)

Liberman knew or should have known that Nagel signed the letter in the belief that the oral agreement of September 20 still prevailed and was not affected by the letter in any material way. As Jenkins testified "We were willing to go ahead in full confidence."

3. Statute of Frauds Does Not Preclude Recovery.

Appellants contend that the September 23 letter does not constitute a sufficient memorandum in writing to satisfy the statute. An examination of the letter, however, makes it apparent there has been full compliance with the requirements of the statute. No exact formula exists to determine the degree of particularity with which the terms of the contract must be set out. *Restatement of Contracts*, Section 207, Comment (a). As pointed out in *Williston on Contracts*, Third Edition, Volume 4, Section 567A, page 22, it is not necessary for the memorandum to specify terms

which the law will imply or which may be inferred from the facts given.

Appellants performed or tendered performance of all their obligations under the agreement. In reliance upon the representations of Liberman, they relinquished their right of first refusal and, at the appropriate time, notified defendants that they elected to exercise their option. In *Condon v. Arizona Housing Corporation*, 63 Ariz. 125, 133, 160 P.2d 342, 346, the Court held:

“The defendants cannot take advantage of their own wrong. The statute of frauds has no application when the agreement has been completely performed by the purchaser.”

Underlying the rationale of this decision is the broader doctrine of equitable estoppel. It constitutes in this case another compelling reason why the statute of frauds is not applicable. As stated in *Waugh v. Lennard*, 69 Ariz. 214, 226-227, 211 P.2d 806, 814 (1949):

“* * * It is universally conceded that the doctrine of equitable estoppel may be invoked to preclude a party to a contract from asserting the unenforceability of a contract by reason of the fact that it is not in writing as required by the statute of frauds. As is often said, the statute of frauds may be rendered inoperative by an estoppel in pais. Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the statute of frauds. This is based upon the principle established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme. * * *”

Appellees gave up their right of first refusal as a part of the agreement with appellants. They informed Gallagher, as requested by Liberman, they no longer were interested in going ahead with

a purchase. It would be inequitable for defendants to now escape their obligation on the ground that it did not comply with the statute of frauds. Appellants are estopped from raising such a defense.

4. Parol Evidence Rule Is Not Applicable.

Appellants refer briefly to the parol evidence rule, arguing that parol evidence was not admissible (Br. 20). (In this regard it should be noted that appellants failed to specify error on the admission of such evidence.) The decisions of the Arizona Supreme Court make it clear that parol evidence may be considered in the situation here involved. In *Crone v. Amado*, 69 Ariz. 389, 397, 214 P.2d 518, 523, the basic rule is stated as follows:

“Where the written language of an agreement is susceptible of more than one meaning the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning.

* * * *

“When ambiguities are present in a contract, its interpretation by the parties is most helpful, and practically all courts give heed to such practical interpretations. This court has long been committed to this rule. * * *”

Moreover, as this Court held in *Kingman Water Company v. United States* (CA 9, Ariz.), 253 F.2d 588, any ambiguity in an instrument will be resolved against the drafter thereof. Under this rule alone the District Court would have been justified in resolving the ambiguity against Liberman.

5. Contract Not Void for Vagueness.

We have referred to evidence supporting the findings that a valid, lawful contract was entered into, supra pages 16-17, including the specific and implied terms thereof, supra pages 18-24, and have shown that the minds of the parties did meet upon the

terms of the agreement found by the District Court, *supra* pages 24-27. Appellants concede that "an incredibly detailed oral agreement" was found by the District Court (Br. 5). There being ample evidence to support the findings concerning the terms of the agreement, it follows that the contract cannot be void for vagueness.

6. Nagel Did Not Fail to Accept Entire Offer.

It is urged that the option is invalid because Mrs. Nagel did not sign the September 24 letter regarding the seven-year agreement. This argument is without merit.

The option to purchase a one-half interest was agreed upon by both parties and the September 23 letter was signed before the September 24 letter was even written. The cases cited by appellants deal with situations where a party attempts to accept an offer in part and reject it in part. The reason Mrs. Nagel did not sign the September 24 letter was simply because it did not comply with the understanding reached by the parties regarding the seven-year agreement. The parties agreed that Nagel had an option to buy a one-half interest at any time prior to April 30, 1959; that they had a second option to buy the remaining one-half interest at the end of seven years (R. 396). Appellants have cited and can cite no authority on the proposition that Nagel's failure to sign the second option is fatal to its action.

Appellees have not based any claim in this action upon the seven-year agreement. Appellants apparently argue that Liberman can profit by his own failures and claim to be released from all of his agreements, because he failed to include the seven-year agreement in the September 23 letter and then failed accurately to set forth the agreement in the September 24 letter.

Joseph v. Donover Co. (CA 9, 1958), 261 F.2d 812, is cited extensively by appellants, beginning at page 12 of their brief. In

its true perspective, it does not support appellants' position on appeal. On the contrary, it supports appellees'. True, the trial judge in that case found that no contract was entered into by the parties and his judgment was affirmed. This is not to say that, had he found a contract to exist, this court would have reversed. The language of the opinion is so definite and explicit on some of the principles applicable to the case at bar that we beg leave to quote therefrom *in extenso*:

"Appellee O'Donnell was the prevailing party below, and hence we must take that view of the evidence most favorable to him. He is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of his liability. If, when so viewed, there was substantial evidence to sustain the findings, then the judgment may not be reversed by this Court unless there is no evidence whatsoever to support the judgment; unless the clear weight of the evidence is against it; or, unless the trial court was influenced by an erroneous view of the law. * * *

* * * *

"If each of these conclusions of law is supported by findings of fact and the findings of fact are supported by the record, as appellee has attempted to point out carefully and in detail in his Appendix II; then, unless the clearly erroneous rule applies, or the trial court has employed the wrong legal principles, we must affirm." (261 F.2d at 817)

* * * *

"Granted that the trial judge *could* have agreed with Joseph's version of the transaction, the fact is that he did not. The trial court passed specifically on the credibility of witnesses telling opposing stories." (261 F.2d at 818)

* * * *

"Irrespective of the fact there was *conflicting* evidence, we point out that in this Circuit (as in others) the rule is that the trier of fact is at liberty within bounds of reason to reject entirely the uncontradicted testimony of a witness

which does not produce conviction in his mind of the witness' testimony. This would be particularly true when the testimony comes from an interested party rather than a disinterested witness. Or, the demeanor of the witness may be controlling rather than his actual words * * * 'the whole nexus of sense impressions' which one gets from a witness. * * * (261 F.2d at 824)

This Court then concluded its opinion as follows:

"We fully agree with and follow the Supreme Court case cited and quoted by appellant, *United States v. United States Gypsum Co.*, 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, that:

'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'

"This Court after a careful perusal of some 375 pages of Briefs and Appendices, most of the exhibits, and over 4,000 pages of transcript, is not left with the conviction, either definite or firm, or otherwise, that a mistake has been committed under the applicable Oregon and Washington law by the trial court in coming to the finding of fact which is decisive of this case—that no joint venture ever came into existence." (261 F.2d at 824)

Appellees respectfully submit that in the instant case, as in *Joseph v. Donover*, "This court after a careful perusal * * * of Briefs and Appendices, most of the exhibits, and * * * transcript" cannot be "left with the conviction, either definite or firm, or otherwise, that a mistake has been committed under the applicable * * * law by the trial court in coming to the finding of fact which is decisive in this case * * *"—that the parties did agree to the effect enumerated in the Findings. And that appellees, as a result,

were damaged in not less than the amount so carefully computed and specified in Finding No. 19.*

II. The Issue on Damages.

The issue raised by appellants on damages involves two questions:

Did the District Court apply the correct rule as to measure of damages and did the District Court correctly compute the amount of damages?

*Appellants assert that in *Joseph v. Donover Co.* this Court was presented "with a transaction almost identical to that presented here" and that "with only slight adjustment parts of that opinion would have served as a proper opinion of the District Court in this case" (Br. 12). This is not so.

In that case the parties had never met prior to their conference. Their alleged contract arose in a discussion in a bar while the men were drinking cocktails. The discussion was never reduced to writing. Neither of the parties knew anything about the property to be purchased. After the conversation in the bar five months elapsed before the parties again spoke or wrote to each other. It was twenty months after that before Joseph requested that the agreement be performed. (261 F.2d at 818-24)

In the case at bar the parties had known each other for years. (R. 1836-37, 374, 783) They had had many business dealings, either with each other or with other persons which threw them into mutual contact. (R. 783, 854-857) They both were intimately acquainted with the property; the Nagels owned the adjoining mill and had compared costs of the two mills on many occasions (R. 268-269, 398); Liberman had the use of 50% of the mill's production since 1956 (Ex. 5). The conference of the parties took place after express arrangements were made, knowing the mill was on the market (R. 874). Liberman chartered a plane and flew from Albuquerque to Winslow for the sole purpose of meeting with the Nagels (R. 873, 379). The meeting took place in Nagel's business office. (R. 380). The discussion lasted for approximately three hours, in which all phases of lumber manufacturing were thoroughly discussed (R. 381-384). It was concluded by a firm agreement (R. 386-389). This was reduced to writing three days later (R. 393). Immediately thereafter Nagel gave Liberman the consideration he sought; that is, Nagel withdrew from negotiations for purchase (R. 395). Except for a period when Liberman was ill, the parties were in constant contact until it became apparent that their dispute was unsolvable (R. 396, 401-404).

A. MEASURE OF DAMAGES.

1. Law Governing Measure of Damages.

The measure of damages for breach of an option allowing a party to acquire an interest in a going business is the amount of future profits reasonably certain to be earned therefrom, where the prospective gains or profits were within the contemplation of the parties and an immediate and direct inducement to the contract.

- Martin v. LaFon* (1940), 55 Ariz. 196, 100 P.2d 182;
Connecticut Ry. & Lighting Co. v. Palmer (CA 2 1940),
 109 F.2d 568; aff. 311 U.S. 544, 61 Sup. Ct. 379, 85
 L.Ed. 336;
Anvil Mining Co. v. Humble (1894), 153 U.S. 540, 14
 Sup. Ct. 876, 38 L.Ed. 814.

2. Profits Were Within Contemplation of Parties.

Under the facts found by the District Court, loss of profits is the proper measure of damages. The testimony and conduct of each party and the circumstances surrounding formation of the contract support the Findings.

Liberman himself testified that his purpose in buying the mill was to operate it "as any normal lumber mill is operated for the purpose of manufacturing timber into lumber" (R. 945) and that he "didn't buy it to put it idle" (R. 945). Liberman also testified:

- "Q. But this transaction at the time you entered into it, you expected, but couldn't predict definitely, would result in a profit to you and the Nagels, isn't that correct, sir?
 A. Yes, sir.
 Q. From the operation of the concern as a going business, isn't that correct, sir?
 A. I don't know.
 Q. But you expected it?
 A. Yes, sir." (R. 1734)

Nagel's intention was to operate the mill for the purpose of earning profits and gaining position in the forest thereby enabling continuance of the profitable operation (R. 1865, 1921).

The parties intended to operate a going concern (R. 337-338, 945). They discussed mergers (R. 791, 1845-1846), working capital (R. 323, 790-791), management (R. 287, 332, 1919, 1928), and availability of future timber (R. 289, 330, 878). They agreed upon the profit the mill would receive from the manufacture of Liberman's Aztec timber (R. 291-292, 391-392, 1846-1847, 1918). The expressed and understood ultimate objective of each party was to operate the Winslow plant as a going concern for the purpose of making a profit (R. 945, 1734, 1854, 1861, 1921).

3. Reply to Argument on Measure of Damages.

Appellants' Contentions Summarized

Appellants' argument that the District Court applied the wrong measure of damages may be summarized as follows:

Even if future profits are recoverable, the amount must be limited to the difference between \$325,000 and one-half of the fair market value of the Duke City Winslow mill (Specification of Error No. 5; Br. 36).

Profits were not within the contemplation of the parties as an immediate inducement to the contract (Specification of Error No. 7; Br. 43).

The transaction should be considered as merely a sale of real estate (Specification of Error Nos. 3 and 4; Br. 32, 33).

(a) FUTURE PROFITS NOT LIMITED TO DIFFERENCE BETWEEN PURCHASE PRICE AND MARKET VALUE.

Appellants contend that under no circumstances and no matter how strongly the evidence supports a finding that the present

value of the profits reasonably certain to have been earned by Nagel is the sum of \$429,883.40, nevertheless damages cannot be awarded in excess of the difference between \$325,000 and one-half of the market value of the Duke City Winslow Mill (Br. 36-41).

Appellants have cited not one single case or other authority to support this wholly illogical theory. *Martin v. LaFon*, supra, is directly to the contrary. There, the cost of performance (purchase price) was \$5,000. Martin's complaint prayed damages of \$30,000 for loss of profits. His offer of proof as to loss of future profits in the operation of a going business (a hotel) was rejected by the trial court. The Arizona Supreme Court reversed and held (100 P.2d at 184):

"We think this evidence was relevant and material to the issue and should have been admitted, and if from such evidence it appeared that the business had made a net profit, it would have sustained, and, indeed, required a judgment for plaintiff for a loss of future profits, in the absence of evidence indicating that in the future they probably would not have continued. * * *"

The Court recognized that a recovery of five times the purchase price for loss of profits would be proper. Under this rule, market value is not material.

The case probably most frequently cited on the question of loss of profits is *Anvil Mining Co. v. Humble*, supra. This case recognizes that the true measure of damages is loss of profit.

(b) PROFITS WERE CONTEMPLATED.

We have set forth, supra pages 34-35, the evidence which establishes that profits were within the contemplation of the parties as an immediate inducement to the contract.

Appellants argue that, because Nagel was interested in acquiring a "position" and because Duke City was interested in having

its Aztec timber milled, the Court erred in finding that profits were within the contemplation of the parties as an inducement to the bargain (Br. 46-54). They fail to comprehend the meaning of "position". This term denotes the acquiring of a status with the Forest Service whereby it will make available a continuing supply of government-owned timber at times and in amounts required by the particular operator. "Position" is acquired by owning and *operating* a mill supplied by Forest Service timber (R. 397-399, 470-471, 1864-1865, 1921). How could this purchase afford Nagel position with the Forest Service unless the plant was operated as a going concern cutting Forest Service timber? For what ultimate purpose is position sought by any lumber operator? Obviously, as with any business concern, for the purpose of making a profit.

Furthermore, was Duke City's primary purpose really the milling of its Aztec timber? Duke City already had a contract with Gallagher to mill all of its Aztec (Ex. 5). Liberman acknowledged that Duke City intended to bid for more Forest Service timber for the Winslow plant from the Sitgreaves National Forest (R. 879-880). Was not Liberman's real purpose to expand his lumber operations?

In *Martin v. LaFon*, *supra*, the Arizona Supreme Court aptly said (100 P.2d at 183):

"* * * The real subject of the option was a going hotel and restaurant business, which had been operated by defendant for about a year and a half, and previously had been operated by plaintiff for some two years. The physical property covered by the lease was practically useless except for the purpose of running the business. It is apparent to us the record shows the parties must have known the only reason why plaintiff desired the assignment of the lease was so he could continue the operation of that particular business on that particular site, for the purpose of making a profit by its operation, and considered that as the inducement for the option. On this state of the record, we think the trial court

erred in striking from the complaint the allegations of special damages by a loss of future profits. * * *

Susi v. Simonds (1951), 147 Me. 189, 85 A.2d 178, where neither party to the contract apparently had any idea as to the intended use of the property, and *Hardinger v. Till* (1939), 1 Wash. 2d 335, 96 P.2d 262, involving a newspaper ad for "someone wanting a home and income", are distinguishable simply upon the excerpts appearing therefrom in appellants' brief (Br. 52-53).

(c) MEASURE OF DAMAGES FOR SALE OF REAL ESTATE INAPPLICABLE.

Appellants devote many pages to a continuation of the argument presented in the District Court that the transaction should be construed as a contract for the sale of real estate (Br. 32-36, 43-54). They cite several cases involving the purchase and sale of real property, most of which deal with transactions involving the purchase and sale of residences (Br. 33-34, 52-53). The language of the District Court, *supra* page 2, makes it apparent that these cases are not applicable.

The acquisition of realty in the purchase of an established business is only one of the elements involved. Often, land values are of little significance. In this case only a fraction of the \$650,000 purchase price represented land value and was but a part of the total consideration. The timber contracts and machinery, fixtures, motor vehicles and other equipment were also involved, as were working capital, plant replacements, etc. (see footnote, *supra* page 2). The District Court correctly refused to treat the transaction merely as a sale of real estate.

Appellants' Specification of Error No. 3 asserts that the damages were "grossly excessive". This argument is based entirely upon the "real estate theory" (Br. 32).

Appellants' Specifications of Error 3, 4, 5 and 7 and the lengthy argument thereunder reduce themselves to one propo-

sition: damages in the form of future profits may be awarded only if bargained for (Br. 53). The court found they were bargained for. Ample evidence supports this finding.

B. COMPUTATION OF DAMAGES.

1. Law Governing Proof of Future Profits.

The principle of law governing the sufficiency of proof of future profits may be simply stated: does the evidence show with reasonable certainty what the profits would have been? *Martin v. LaFon* (1940), 55 Ariz. 196, 100 P.2d 182.

The fact of damage through defendants' breach having been established, a liberal rule is applied in determining the amount of such damages. Inability to calculate damages with absolute exactness does not render the amount too uncertain for recovery. The modern rule makes it clear that difficulty in ascertaining the amount of damages is no longer confused with the right of recovery. Recovery of future profits is allowed if a rational and reasonable basis of computation is afforded, although the amount be only approximate.

Jacob v. Miner (1948), 67 Ariz. 109, 191 P.2d 734;
Martin v. LaFon (supra);

Connecticut Ry. & Lighting Co. v. Palmer (CA 2 1940),
109 F.2d 568; aff. 311 U.S. 544, 61 Sup. Ct. 379, 85
L.Ed 336;

Shannon v. Shaffer Oil & Refining Co. (CA 10 1931),
51 F.2d 878;

*Excelsior Motor Mfg. & Supply Co. v. Sound Equipment,
Inc.* (CA 7 1934), 73 F.2d 725;

Julian Petroleum Corporation v. Courtney Petroleum Co.
(CA 9 1927), 22 F.2d 360.

No fixed and definite rule exists for determining in every case what facts are to be considered in determining future profits.

The sufficiency of the evidence must rest within the discretion of the trial court based upon the facts of the particular case.

Connecticut Ry. & Lighting Co. v. Palmer, supra;
Hawkinson v. Johnston (CA 8 1941), 122 F.2d 724, cert.
 denied, 314 U.S. 694, 62 Sup. Ct. 365, 86 L. Ed. 555.

One of the most common methods of establishing future profits is through the use of records showing profits earned in the past.

Martin v. LaFon, supra;
Connecticut Ry. & Lighting Co. v. Palmer, supra.

The opinions of experts may be received and considered on the question of future profits.

Sheldon v. Metro-Goldwyn Pictures Corporation (1940),
 309 U.S. 390, 60 Sup. Ct. 681, 84 L.Ed. 825;
Connecticut Ry. & Lighting Co. v. Palmer, supra;
Julian Petroleum Corporation v. Courtney Petroleum Co.,
 supra;
Universal Pictures Co., Inc. v. Harold Lloyd Corporation
 (CA 9 1947), 162 F.2d 354;
McCormick on Damages, Sec. 29, p. 109.

The kind and the amount of evidence that will be held to afford a sufficient basis for estimation of loss of future profits varies greatly in different kinds of cases. Doubts are generally resolved against the party committing the breach of contract. *Restatement of Contracts*, Section 331, Comment c, p. 517.

2. Method of Calculation.

Computation Summarized

The District Court's award of damages for loss of profits was computed by finding the following basic elements from the evidence (Finding 19; R. 196-200):

Existence of a market for lumber which will permit continued realization of profits;

Availability of timber for manufacture into lumber;

Calculation of amount of net profit per thousand board feet of lumber which would have been earned by Nagel after deducting its cost of performance;

Determination of amount of net profit which would have been earned by Nagel in each year and reduction thereof to present value.

The District Court determined that a market will exist for the lumber produced by the Duke City Winslow mill at prices which will permit continued realization of profits through 1973; that during this period a supply of timber will be available which will result in a net lumber recovery of 266,565,000 board feet; that, after fully taking into consideration the cost of performance, the profit per thousand would have been \$3.00 per thousand board feet on 71,880,000 board feet (denominated Duke City Aztec) and \$4.71 per thousand board feet on the balance of 194,685,000 feet (denominated Forest Service timber and Gallagher Aztec); that this lumber would have been manufactured and sold and profits realized thereon in each year through 1973 in the amounts reflected in Finding 19(f); that the present value of Nagel's half of the total profits is \$478,633.40; that the present value of the interest which Nagel would have paid on the purchase price is \$48,750.00; and that the net damages sustained by Nagel total \$429,883.40.

(a) EXISTENCE OF MARKET.

Kenneth Smith, an economic consultant, testified as an expert. His experience throughout a career in the lumber industry dating back to 1912 has given him a thorough knowledge of all phases of the lumber business (R. 629-635).

His testimony establishes with reasonable certainty the existence of a market for the lumber which will be produced by the Duke City Winslow mill at a profit at least comparable to that received now and for several years past (R. 646).

Appellants have not challenged Smith's qualifications or his testimony regarding market conditions; in fact, his testimony is completely ignored. For this reason, no extensive review of this phase of the damage question is necessary.

Summarizing this point briefly, Smith stated that there is "every anticipation that there will be a market for lumber in excess of the ability of the industry to supply lumber"; that there will be "a considerably greater demand for lumber by 1973 than there is today or was in 1952." His opinion was reached after studies as to "the position of Arizona in the lumber supply business and its prospect for market for Arizona timber" (R. 642-643).

The economic background against which the picture of future profits must be viewed is that there is going to be the opportunity—based upon limitation of supply as opposed to increase in demand—to make as much or more profit in the future from the operation of the Duke City Winslow mill as has been made by Nagel and the Arizona Timber Company in the past several years (R. 645-646).

(b) AVAILABILITY OF TIMBER.

Exhibit 9 sets out the sources and amounts of timber available for manufacture at the time of purchase and reasonably certain to be available in the future. The evidence is briefly summarized as follows:

(1) *Timber under Contract by Gallagher at Time of Purchase.*

Appellants' purchase included Aztec timber owned by Gallagher (denominated Gallagher Aztec Timber) capable

of producing 17,520,000 board feet of lumber, and Forest Service timber under existing contracts capable of producing 21,680,000 board feet of lumber, based on an overrun of 15% on net log scale* (R. 70; Ex. 9).

- (2) *Duke City Aztec*. The District Court found that the Aztec timber already owned by Duke City at the time of the purchase of the Winslow mill would be manufactured by Duke City and Nagel in the Winslow mill (R. 291-292, 391-392, 1846-1847, 1918). The amount of Duke City's Aztec timber at the time of purchase was 62,505,000 board feet net log scale (71,880,000 board feet net lumber recovery. Ex. 9, items 1(a) plus 2(b)).
- (3) *Future Forest Service Timber*. Dahl Y. Kirkpatrick, Assistant Regional Forester in Charge of the Division of Timber Management of the United States, testified to the existence and availability of a future timber supply to Nagel and Duke City (R. 470-476).

The sales by the Forest Service are tailored to the needs of the individual mills and are made from the working circle which supplies the particular mill in question (R. 468-471). Kirkpatrick testified that the Chevelon work-

**Overrun*. Experience has shown that the number of board feet of lumber as measured at the conclusion of the manufacturing process exceeds the number of board feet of the original timber as estimated in the forest on a net log scale. This difference is known as the "overrun".

In determining the amount of lumber to be sold in the future, it was necessary for the District Court to determine the net lumber recovery which could be expected from the timber available. This was accomplished by determining the probable percentage of overrun and then using this figure to convert the available timber measured on a net log scale basis into projected net lumber recovery.

The percentage of overrun used by the District Court in its computation of damages was 15%. This figure is shown by the evidence to be conservative and has not been disputed by appellants.

ing circle from which the Duke City Winslow mill is supplied is covered by a management plan, which constitutes a projection of timber to be cut from the working circle during a period of twenty years (R. 471-473). The timber is divided into sale blocks in sizes suited to Nagel and Duke City and the sales are timed to correspond with their needs (R. 470-471). Immediately prior to the trial, a 27 million board foot sale "keyed" for the Nagel mill was purchased by it without competition (R. 467). At the time of trial a sale "keyed" to the needs of Duke City had been announced and Nagel indicated that it was not going to bid thereon (R. 401, 468-469).

In describing the procedure as it now exists and in all probability will exist in the future, Mr. Kirkpatrick testified:

"Q. In other words, if we may translate that from the general to the precise situation, do you mean that if a Nagel contract was about to run out for timber—I'm speaking of prior to the Aztec deal—you would try to determine what should be sold and what its needs were and then notice it for sale with that in mind?

A. That's right, timing it so the sales were fitted in with the needs of the industry or purchasers we had.

Q. And the same prevailed with regard to—

A. That's right.

Q. —Gallagher, who was in the picture at the time?

A. That's very true.

Q. Now, will that same procedure be, in your opinion, followed in the future after this Aztec timber is cut out?

* * * * *

A. I would presume that the same course will be followed in the future. Our management plan that I referred to a while ago contemplates that we will sell the stated amount each year from the—that is we will secure the cutting of a stated amount each year from the working circle.

Well, the only way to do that and to sustain the industry and the people that are dependent upon the industry is to keep the sales fitting on end to end, if you see what I mean." (R. 470-471).

Since 1942 in the Chevelon working circle the mill for whose needs each sale was tailored has acquired the timber offered in each particular sale (R. 466). Except for a small quantity of burned timber, all the Forest Service timber that has ever been sold from the Chevelon working circle has gone to the two mills in Winslow (R. 466, 495-496, 757-758). Liberman himself testified that future Forest Service sales were and are his intended source of future timber for the Winslow plant (R. 879, 938-939).

The present Management Plan of the Forest Service provides 21,000,000 feet of timber net log scale (24,150,000 board feet net lumber recovery) for cutting in the Chevelon working circle each year through 1968; and the allowable cut thereafter is 18,163,000 feet net log scale (20,887,000 board feet net lumber recovery) per year for the succeeding twenty years (R. 474-476).

From all of the evidence, the reasonable probabilities are apparent and were found by the District Court: The Forest Service will make available the amounts of timber reflected in the Management Plan; and one-half of this amount will be acquired by Duke City for its Winslow operation.

(c) PRODUCTION OF AVAILABLE TIMBER BY YEARS.

The District Court based its award of damages upon a total production of 266,565,000 board feet of lumber. The estimated production by years is set forth in Finding of Fact No. 19(f). The estimate is based upon a projected production of 30 million feet per year through 1963, at which time all the Aztec timber will

have been cut (Ex. 13). The estimated production is then accounted for by Forest Service timber based upon Government projections contained in the Management Plan.

(d) PROFIT PER THOUSAND BOARD FEET OF LUMBER.

The District Court applied two different figures representing profit per thousand board feet. One figure, \$3.00 per thousand board feet, was applicable to the Aztec timber already owned by Duke City. The second figure, \$4.71 per thousand board feet, applied to the balance of the timber comprised of Gallagher Aztec timber and Forest Service timber under contract and to be acquired in the future.

- (1) *\$3.00 per thousand from Milling Duke City Aztec.* The District Court found that the joint operation would have realized a profit of \$3.00 per thousand for milling Duke City's 71,880,000 feet of Aztec timber—a total of \$215,640.00. Nagel's one-half of this profit amounts to \$107,820.00 and would have been derived in the years 1959 through 1963 in the amounts indicated in Finding of Fact No. 19(b) (R. 193). See page 12, *supra*.
- (2) *\$4.71 per thousand for Gallagher Aztec and Forest Service Timber.* The memorandum ruling filed by the District Court on July 28, 1961 (R. 196-200) shows in detail the manner in which the \$4.71 figure was computed. The District Court found that Nagel's experience in its own mill from 1952 through 1959 was a sound basis for calculating the probable future profits. Plaintiffs' Exhibit 10 shows the manner in which Nagel's profit per thousand board feet before depreciation was computed. This figure furnishes the basis for an accurate estimate of the probable profit per thousand to be expected from the Duke City Winslow operation. It is based on Nagel's experience over an eight-year period in a similar and adjacent plant operating with the same source of timber

supply (R. 268, 417-419). It is corroborated and in fact shown to be conservative by Duke City's own estimate of future profits based upon its knowledge of Gallagher's performance in the years preceding the purchase (R. 68-69). It is further corroborated by Duke City's failure during the trial to produce its own books relative to the Winslow operation (R. 1100-1104). The similarity between the Nagel and the Duke City Winslow mills was confirmed by appellants in the District Court (R. 1043-1044).

The District Court determined that the total profit before depreciation realized by Nagel from 1952 through 1959 was \$1,591,791.40 on a total lumber production of 140,956,000 board feet (Ex. 10). Before arriving at a net profit figure per thousand board feet, the District Court determined that certain additional deductions should be made. These are best set out in the District Court's own language contained in the Memorandum Ruling of July 28, 1961:

"As to the \$4.71 per 1,000 board feet on the Gallagher Aztec and Forest Service timber, the court felt that the comparable operation of the Nagels during the years 1952-59 was a sound basis for estimating probable future profits of the joint operations of plaintiffs and defendants, had the contract not been breached. However, the court determined that the plaintiffs' claimed figure for profit before depreciation, that is, \$1,591,791.40 (Plaintiffs' Exhibit No. 10) was too high and made the following deductions: (a) Deducted interest paid by Nagels in the 1952-59 period in the sum of approximately \$72,000.00; (b) While some management expenses had been deducted in reaching the \$1,591,791.40 figure, it was estimated that the management expenses of plaintiffs' and defendants' operations would be probably \$5,000.00 per year higher and accordingly, \$40,000.00 should be deducted to make the Nagel experience more nearly comparable; (c) The joint operation of plaintiffs and defendants would require working capital with the resulting interest cost thereon,

and defendants' estimate of \$500,000.00 at a 6% rate would require an additional deduction of \$240,000.00 for the 8-year period covered in Plaintiffs' Exhibit No. 10.

"The total of the deductions mentioned above, \$352,000.00, taken from the \$1,591,791.40 left \$1,239,791.40; and when this was divided by the Net Sales FBM of 140,956,000, the operating profit before depreciation was \$8.80 per 1,000 board feet." (R. 197-198)

The District Court then determined that purchase costs must be deducted and that this could and should be done by way of depreciation before arriving at a final net profit per thousand. The depreciation figure was computed by adding to the entire \$650,000 cost of the plant less the salvage value, the \$301,353.00 replacements which would be necessary during the 15 year period (Ex. 11). It should be deducted from future profits by deducting depreciation in the amount of \$3.57 per thousand board feet from the \$8.80 figure set forth above.

Although a great deal of "risk and hazard" was already accounted for by using an eight year period in the past as a basis for estimating future profits, the District Court determined that a further deduction in this regard should be made. Again, referring to the Memorandum Ruling:

"Deducting from the anticipated profit before depreciation of \$8.80 per 1,000 board feet, the depreciation of \$3.57 per 1,000 board feet left a probable net profit of \$5.23 per 1,000 board feet. However, since the calculation being made was of future profits and there is always uncertainty and chance in the future, the court determined to reduce the probable figure by 10% or 52¢. The result was a finding of a profit to plaintiffs and defendants, had the contract not been breached, of \$4.71 per 1,000 board feet on the Gallagher Aztec and Forest Service timber." (R. 198)

(e) COMPUTATION OF PROFIT PER YEAR AND TOTAL PROFIT.

The District Court then computed the profit to be received in each of the years through 1973 by multiplying the applicable net profit per thousand by the amount of estimated production for each year, divided the net so calculated in half to represent the Nagel's share and then reduced the figure to present value. The resultant figure was \$478,633.40.

Finally, this figure was reduced by the sum of \$48,750 representing the present value of interest computed on the purchase price of \$650,000 (Ex. 4). The net amount then remaining, \$429,883.40, was held to be the net damage sustained by Nagel as a result of appellants' breach of contract.

3. Reply to Argument on Computation of Damages.

Appellants' Contentions Summarized

Appellants attack the method used by the District Court in computing appellees' damages in four respects:

By alleging that the trial court failed to deduct Nagel's cost of performance (Specification of Error No. 6; Br. 41);

By asserting that a net profit of \$4.71 per thousand would not be possible in the future when production drops below 30,000,000 board feet per year (Specification of Error No. 8; Br. 61);

By taking into consideration timber not actually under contract (Specification of Error No. 8; Br. 56);

By projecting the profits for too long a period into the future (Specification of Error No. 8; Br. 60).

(a) THE DISTRICT COURT DEDUCTED NAGEL'S COST OF PERFORMANCE.

Appellants persist in arguing, as they did in the District Court, that no consideration was given to Nagel's cost of performance. The evidence, findings and comments of the District Court show

that Nagel's cost of performance was fully deducted from the profits awarded (R. 196-200; Finding 19; Ex. 11). Appellants use the term cost of performance when referring to Nagel's share of the purchase price (Br. 41-43). The entire purchase price (less salvage) plus replacements was deducted from profits by way of depreciation before damages were computed (Ex. 11).

Appellants are asking that the cost of Nagel's performance be charged twice. This would clearly be the result if both the depreciation and the purchase price were charged against profits (unless a counter-balancing credit for the amount accumulated by depreciation were also allowed which would simply have the effect of cancelling out the depreciation deducted). The District Court also deducted the entire amount of interest payable by Nagel on the purchase price and the interest chargeable to working capital.

The District Court carefully explained its method of computation to appellants as follows:

"The Court: Is it your understanding I didn't deduct depreciation, which covers the cost of acquiring the plant?"

Mr. Enersen: No, your Honor.

The Court: Well, I certainly did.

Mr. Enersen: I do not contend you failed to deduct depreciation.

The Court: Well, the cost of the acquisition is covered in the depreciation.

Mr. Enersen: This, I believe, is an erroneous assumption on the part of the Court. It is true that after a person makes an investment in a business, has his capital tied up in a business he can through depreciation over a period of time recover, piecemeal, the amount of the investment, assuming that the profits are sufficient to pay the depreciation and the cash position of the business is such that the depreciation

can be withdrawn from the business and paid to the proprietor. But in order to get the depreciation the investor must put the money into the business in the first place.

The Court: If he puts the money in and you charge it out by way of depreciation, if you are to charge him for the investment and depreciation you take it twice. It is only invested once, and when you take it out by way of depreciation you have liquidated your investment, charged it to depreciation." (R. 55-56)

(b) \$4.71 PROFIT PER THOUSAND IS PROPER FOR ENTIRE PERIOD.

We agree that a reduction in the amount of timber available will reduce the total profit of any operator. It does not necessarily follow that the profit per unit of production will be reduced; the evidence fully supports the finding that the same profit per thousand will be realized even after the production drops below 30,000,000 feet per year. Jenkins testified that the profit per thousand to be realized from the Duke City Winslow mill from a production of 10,000,000 to 12,000,000 feet per year would be the same as that realized from the production of 30,000,000 feet per year (R. 1403). He based this testimony upon his knowledge of both the Nagel and Duke City Winslow plants and upon the records and evidence produced during the trial (R. 1402-1403). He testified that the Nagel mill had realized a substantial profit per thousand when operating in the past on 10,000,000 to 12,000,000 feet per year (R. 1403). His statement is corroborated by Exhibit 10. He carefully explained the relatively minor changes that would have to be made to convert the Duke City Winslow mill to a production of 10,000,000 to 12,000,000 feet per year, principally a reduction from a double to a single shift (R. 1406).

Substantial evidence supports the trial court's conclusion that the \$4.71 profit figure would be applicable during the entire period.

(c) DISTRICT COURT PROPERLY CONSIDERED FUTURE FOREST SERVICE
TIMBER.

Appellants urge that any award of future profits must be limited to timber actually under contract and that timber which will be cut under contracts awarded by the Forest Service in the future must be disregarded (Br. 56). The evidence refuting this contention has heretofore been discussed at pages 43-45, *supra*, and clearly shows there can be little doubt that timber from the Sitgreaves National Forest will be available in perpetuity.

Appellants elicited testimony and rely on it (Br. 57), which appellees do not dispute, that no one can "guarantee" success in bidding on timber sales, and that no one can "guarantee" that the Sitgreaves National Forest will not be destroyed by fire or pestilence. Appellants' insistence upon the word "guarantee" indicates their misconception of the legal principles involved. The Arizona Supreme Court in *Martin v. LaFon*, *supra*, allowed recovery for loss of future profits arising from the breach of an option to acquire the operating rights to the Jefferson Hotel in Phoenix. Certainly in that case plaintiff could not "guarantee" future profits, nor freedom from fire, nor that a new Hilton hotel would not be erected across the street from the Jefferson. But a "guarantee" of future profits was not required. "The test is whether such evidence is sufficient to show with reasonable certainty what the future profits would have been" (100 P.2d at 184).

Proof of lost profits need not be such as to put the issue beyond doubt. The proof is sufficient if a basis for a fair and reasonable estimate is afforded. This rule was stated in *Anvil Mining Co. v. Humble*, *supra*, and has been consistently followed.

The applicable principle was concisely stated in *Connecticut Ry. & Lighting Co. v. Palmer*, *supra* (109 F.2d at 571):

"* * * In cases where recovery of prospective damages on breach of contract is demanded, the plaintiff is not called on to prove to a dead certainty that he will suffer a loss

from the defendant's wrong. Reasonable expectation of loss is all that can generally be proved. * * *

Courts have been confronted with claims for loss of future profits and have allowed recovery in types of endeavor far more hazardous and uncertain than the lumber industry.

A claim for loss of future profits based on breach of a contract to dig an oil well was allowed this Court in *Julian Petroleum Corporation v. Courtney Petroleum Co.*, supra. In disposing of the defense of uncertainty, this Court stated (22 F.2d at 362-363):

"No doubt there are elements of uncertainty in this case, such as the fact of production, the amount of production, its duration, the value of the oil, and perhaps in other respects; but the testimony offered was the best obtainable, and we think that under the authorities its weight was for the jury."

Salmon fishing in Oregon's Tillamook Bay was the subject of controversy in *Blanchard v. Makinster* (Ore. 1931), 137 Or. 58, 1 P.2d 583. In allowing recovery for loss of future profits, the Oregon Supreme Court stated the problem and its controlling principle as clearly and succinctly as in any reported case (1 P.2d at 586):

"* * * Doubtless it is true as the defendants contend, that a commercial fisherman is confronted with many hazards over which he can exercise no control; for instance, the tides, the weather, market conditions, the number of other fishermen operating in the same locality, and so forth. But no business is free from uncertainties, and if the courts are to search only for the hazards which might deprive a particular venture, whose course is interrupted by a tortious defendant, of its profits, no injured plaintiff can ever recover just relief for the damage sustained. * * *"

Appellants make repeated reference to *Peters v. Lines* (CA 9, 1960), 275 F.2d 919, as authority for the argument that only timber actually under contract can be considered. There is the difference of night and day between the proof of future damages in *Peters* and in the instant case.

The profits awarded by the District Court here are clearly based on evidence. In *Peters*, a portion of the award resulted from a mathematical error. Other portions were either not supported by the evidence (as in regard to the disruption of the bankrupt's woods operation) or were contrary to the evidence (as in regard to the loss of truck earnings). Furthermore, in regard to future damages, this Court held (275 F.2d at 931):

“* * * Irrespective, however, of such error, the evidence is insufficient to justify such award. The maximum timber in the Redwood Creek Ranch area owned by the bankrupt at the time of the breach by appellants was 200 million board feet. *No evidence was received that bankrupt had in the form of options or otherwise acquired or could have acquired additional timber in the Redwood Creek Ranch area.* Furthermore, the evidence is clear that only about 40 per cent of the remaining timber owned by bankrupt would be deliverable or delivered to the appellants. Such factors were not reflected in the computations apparently made by the referee. The result is that here again the award is speculative and hypothetical.” (Emphasis supplied.)

Here Nagel produced its Certified Public Accountant's reports for the period from 1952 through 1959 (Ex. 7A-7I). There is no contention that they are incorrect. The calculations of profit were made on precise evidence. The timber stands and their availability were fully certified by the records and by the testimony of Dahl Kirkpatrick. The probability of profit was proved by the opinion of a highly qualified expert. The conclusions of the referee in *Peters* were the results of generalized estimations, assumptions, and predictions not supported by the books of the bankrupt or the evidence.

Even Liberman's testimony recognizes that future Forest Service timber should be considered. He testified that as of September 1958 "my understanding is that in that circle there is available about 9 to 10 million feet per year" not forever but for ten or fifteen years in any event (R. 1694, 1708). His figures, when allowance is made for a 15% overrun, are well within the bounds of production which the District Court took into consideration in computing damages. See Finding 19(f). He also testified that during the first seven years, after using up the Aztec timber and the timber under existing Forest Service contracts, he would get timber from sales to be made by the Forest Service (R. 879-880). Finding 19(f) shows that in 1960 appellants would begin using timber from new Forest Service sales.

(d) FUTURE PROFITS PROPERLY PROJECTED FOR FIFTEEN YEARS.

How many years into the future should loss of profits be projected? Appellants have complained that the fifteen year period used by the District Court is too long (Br. 60). They have offered no alternative period of time, except to say that profits should be limited to timber under contract (Br. 56). It must be conceded that any choice of a given number of years involves some degree of arbitrary decision. In *Connecticut Ry. & Lighting Co. v. Palmer*, supra, in considering the problem of how many years forward profits should be projected, the Court pointed out (109 F.2d at 571):

"* * * Any selection may seem somewhat arbitrary; whatever the number of years taken, a critic may ask why one year less or one year more was not taken. Obviously the predictable period varies in particular cases according to the stability of the business and other elements. * * *"

The fifteen year period fixed by the District Court was not a hypothetical figure; it is amply supported by the evidence.

In the light of all the evidence produced, it is a conservative figure.

Kenneth Smith testified that subject to the contingency of fire or a drastic change in the policy of the United States, Forest Service timber will be available to the Duke City Winslow mill in perpetuity (R. 637). Smith further testified that Nagel could expect to make as much per thousand feet over the period ending in 1973 as it has in the past and that this is a "very conservative opinion" (R. 646). The testimony of Dahl Kirkpatrick establishes that the present Management Plan for the Chevelon working circle extends beyond 1973 (R. 474-475).

The evidence and realities fully support the finding of a future timber supply and that Duke City will purchase, manufacture and sell at a profit its share of this timber for a period of time far beyond fifteen years. When considered in the light of the controlling principles of law, which require the amount of future profits to be established only to a reasonable degree of certainty, the projection of fifteen years is most conservative.

Appellants cite *Hawkinson v. Johnston*, *supra*, in support of their contention that a period of fifteen years is too long. This case is authority for just the contrary. The period for future damages adopted by the District Court was ten years. The Circuit Court held that, based upon all the evidence, including past history, present conditions and expert testimony, the judgment of the District Court was warranted. The language of the Circuit Court in *Hawkinson*, however, is persuasive authority for upholding the District Court's selection of a fifteen year period in the instant case (122 F.2d at 731):

"It will of course generally be argued in a case of this character, as it is here, that any period of definite forecast or certain predictability attempted to be fixed by the trial court is arbitrary and excessive. But the rule for determining

the damages in such a situation is no different than in any other case. The damages are not speculative merely because they cannot be computed with mathematical exactness, if under the evidence they are capable of reasonable approximation. Obviously there is not, nor can there be a fixed, uniform period for which damages should be allowed in every case of total breach of a long term lease, but the period for which the damages can be reasonably forecast or soundly predicted in such a situation must depend upon the circumstances and evidence of the particular case. Thus, in *Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 61 S. Ct. 379, 85 L.Ed. 336, damages were allowed in a bankruptcy proceeding, on an unexpired term of 969 years, for an eleven year period, three of which had already passed at the time of trial.

“The Missouri courts have recognized that ‘The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach, and not to such as are the certain result, but uncertain in amount.’

“This is the same test that was applied in *Palmer v. Connecticut Railway & Lighting Co.*, supra, page 561 of 311 U.S., page 385 of 61 S.Ct., 85 L.Ed. 336, where the court said: ‘Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion. The certainty of the evidence as to damages for rejection of a lease depends upon the same tests as in other situations where damages are difficult of proof.’

“Plaintiff argues on his cross-appeal that, under the testimony of the expert witnesses which he produced, and to which defendant offered no opposing experts, the court should have fixed the predictable damage period at not

less than fifteen years. But the trial court was not required to accept at face value the opinion of the expert witnesses as to future rental returns and tax valuations. The weight to be given purely opinion evidence is always a matter for the appraisal and judgment of the trial court or jury, in the light of all the circumstances of the particular situation." (122 F.2d at 731)

Appellants' entire argument on damages ignores the fact that the necessity of undertaking the admittedly difficult task of estimating future damages was caused by appellants' wrongdoing, not appellees'. As stated in the *Connecticut Ry.* case, supra (311 U.S. at 385):

"* * * The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for non-existent certainty. * * *"

CONCLUSION

The many adjectives used to characterize the Court's rulings on various points would lead one to believe that the case was hurriedly tried or hurriedly decided without adequate consideration by the trial court. The exact contrary is true.

The presentation of evidence required eight days, during which a daily transcript was furnished the court and counsel on both sides. Exhaustive briefs were prepared, submitted and considered and the post-trial motions were orally argued at length and likewise considered.

If the trial had been to a jury the language used might be more understandable, but even then it would not have been justified under the evidence. Much less is it so when one considers that the case was tried to the court by an extremely able and respected trial judge. His award was not "swollen", he did not "ignore or sweep aside" the business realities of the transaction, he did not view the parties' conduct as occurring in a "never-

never land" (Br. 2); he did not base his award on any "novel theory" (Br. 6) nor on any "magic" (Br. 2); he did not "disregard the evidence and the law" (Br. 7); he did not attempt to "surmount" any obstacle (Br. 23); he did not employ a "creative effort" to make an agreement where none existed (Br. 29); he did not "penalize" appellants (Br. 30); he was not "swept up" by anything nor "lose sight" of the basic questions in issue, nor did he succumb to any "mumbo jumbo" (Br. 32); he did not find any "astronomic" values (Br. 33); his award was not "grotesque" (Br. 36); his decision was not "absurd" (Br. 40); he did not go "astray" in any manner (Br. 41); he made no "purported" adjustment nor became involved in a "tangled computation" in which he outwardly based his award (Br. 41); he committed no "glaring error" (Br. 42); his computation was not "complicated" (Br. 56).

There is no merit to the appeal. The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF CONFORMANCE

I hereby certify that I have examined the provisions of Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the above-tendered brief conforms to all of the requirements of said Rules 18 and 19.

ELIAS M. ROMLEY



No. 17642

In the

United States Court of Appeals

For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK
GREVEY, co-partners, d.b.a. DUKE CITY LUM-
BER COMPANY, and DUKE CITY LUMBER COM-
PANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT
T. JENKINS and GEORGIA MAE JENKINS, gen-
eral partners, and GEORGIA MAE JENKINS,
Trustee for JAMES HENRY NAGEL, limited
partner, d.b.a. NAGEL LUMBER & TIMBER
COMPANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited part-
nership,

Appellees.

Reply Brief for Appellants

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SUBJECT INDEX

	Page
Introduction	1
Argument	2
1. The Parties Did Not Intend to Affect Their Legal Relations in Winslow on September 20, 1958.....	2
2. There Was No Contract.....	2
3. The Award Was Grossly in Excess of the Value of One-Half the Mill Minus the Contract Price.....	8
4. The Present Value of Profits Reasonably Expected to Be Earned from Ownership of One-Half the Mill Cannot Be Substantially Greater Than the Excess, if Any, of the Market Value of the Property Over the Contract Price.....	8
5. The District Court Failed to Take Into Account the Full Cost of Appellees' Performance.....	10
6. Future Profits Were Not Bargained for.....	10
7. The District Court Erred in Computing Anticipated Profits.....	11
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	Pages
Boyer v. Bowles, 310 Mass. 134, 37 N.E. 2d 489 (1941).....	6
Bradley v. Industrial Comm'n, 51 Ariz. 291, 76 P.2d 745 (1938)....	6
Central Casualty Co. v. Neuman Transit Co., 203 F. Supp. 413 (D. Wyo. 1962)	5
Chafin v. Main Island Creek Coal Co., 85 W.Va. 459, 102 S.E. 291 (1920)	6
Hawkinson v. Johnston, 122 F.2d 724 (8th Cir.), <i>cert. denied</i> , 314 U.S. 694 (1941).....	14
History Co. v. Dougherty, 3 Ariz. 387, 29 Pac. 649 (1892).....	6
Joseph v. Donover Co., 261 F.2d 812 (9th Cir. 1958).....	2
Martin v. La Fon, 55 Ariz. 196, 100 P.2d 182 (1940).....	9, 10
Palmer v. Connecticut Ry. & L. Co., 311 U.S. 544 (1941).....	14
Peters v. Lines, 275 F.2d 919 (9th Cir. 1960).....	12, 13
Russell & Pugh Lumber Co. v. United States, 290 F.2d 938 (Ct. Cl. 1961).....	13
OTHER	
Wixon, Accountants' Handbook 18.3 (1957).....	9

In the

United States Court of Appeals

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MAURICE LIBERMAN, JOSEPH GREVEY and JACK GREVEY, co-partners, d.b.a. DUKE CITY LUMBER COMPANY, and DUKE CITY LUMBER COMPANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT T. JENKINS and GEORGIA MAE JENKINS, general partners, and GEORGIA MAE JENKINS, Trustee for JAMES HENRY NAGEL, limited partner, d.b.a. NAGEL LUMBER & TIMBER COMPANY, a limited partnership, and NAGEL LUMBER & TIMBER COMPANY, a limited partnership,

Appellees.

Reply Brief for Appellants

INTRODUCTION

In appellees' brief a carefully selected transcript reference is cited here and there in a vain attempt to support the findings and conclusions of the District Court. Even their own citations do not support appellees' position. And in light of all the evidence the findings and judgment cannot stand.

Either appellees have not addressed themselves to appellants' arguments on the law, or they have failed to meet them.

This judgment must be reversed.

ARGUMENT**1. The Parties Did Not Intend to Affect Their Legal Relations in Winslow on September 20, 1958.***

(Br. 7, 8, 10-15; Appellees' Br. 3-8, 14, 16, 18-22).

It was understood when Maurice Liberman left Winslow on September 20, 1958, that purchasing the mill together would be a good idea. (Br. 5, 11, 47-48; Appellees' Br. 21). None of the terms of an agreement had been worked out. (Br. 11-12, 13-14; Appellees' Br. 23-24). Maurice Liberman was to return to Albuquerque to prepare the agreement. (Br. 5; R. 293, 335, 386-387, 393, 794-796, 882-883, 1548, 1571-1572, 1839, 1922). He prepared two letters. Appellees signed one, but not the other. (Br. 5, 30-32; Appellees' Br. 30). Appellees gave up their right of first refusal only after the first letter was signed. (R. 394-395). Until that letter was signed, no one intended to be bound. Appellees have not distinguished negotiations from legal obligations. Appellees cannot and do not controvert the legal principles of contract liability set forth in *Joseph v. Donover Co.*, 261 F.2d 812 (9th Cir. 1958). Those principles apply here. (Br. 6, 8, 10-15). The evidence will not support a finding that an enforceable agreement was made September 20, 1958.

2. There Was No Contract.

First, there was no meeting of the minds.† (Br. 7, 8, 15-28; Appellees' Br. 7-8, 16-17, 24-29).

*The references in this brief to the printed record are thus: (R. 101); the references to the exhibits, thus: (Ex. A); the references to appellants' opening brief, thus: (Br. 10); the references to appellees' brief, thus: (Appellees' Br. 20).

†Appellees argue that appellants' version of the contract is not involved on this appeal. (Appellees' Br. 18). Whenever there is no meeting of the minds, each party will stand on his own interpretation. The District Court held that appellees did not agree to appellants' interpretation. The question whether the District Court disregarded the evidence and the law in doing so is open on appeal, as is the question whether there was a meeting of the minds.

Appellees in their brief finally perceive what has been implicit in their position since the filing of the amended complaint: An analysis based on a finding that any option was to have the duration specified in the September 23 letter agreement would be fatal to their case. (Appellees' Br. 24-27; Br. 15-28).

Appellees do not challenge appellants' contention that no one would ever grant or expect to receive an option open until cancelled by mutual consent to participate after purchase at the initial purchase terms. (Appellees' Br. 24-26; Ex. 3 (R. 1423)). To grant such an option would be beyond human understanding; to receive it, too good to be true. (Br. 15-17, 22, 26-27).

Appellees, therefore, continue to urge that they were party to an option expiring April 30, 1959, no later. They argue that there was a meeting of the minds because the District Court determined that both parties expressly assented to such an option. (Appellees' Br. 25). But this determination was clearly wrong. The court below could not properly find that the parties had assented to any option except an option with the duration provided in the September 23 letter agreement. The option in the letter agreement did not expire April 30, 1959. (Ex. 3 (R. 1423)). Appellees cannot and do not deny this. (Appellees' Br. 25).

Appellees cannot lawfully escape from the final paragraph of the letter agreement. The September 23 letter was the signed writing required by the Arizona statute of frauds. (Br. 18-20). Appellees cannot and do not deny that it was an integrated document. (Appellees' Br. 25-27, 29). They argue that appellants are estopped to rely on the statute. They say the parol evidence rule does not apply. (Appellees' Br. 25-28, 29).

Appellees' cases, however, do not stand for the proposition that the statute of frauds will allow a written contract for the sale of realty* to be disregarded once one of the parties has per-

*Appellees repeatedly assert that only a negligible amount of real property was involved in this transaction. (Appellees' Br. 2, 35, 38-39). Simple addition of the sums listed in the footnote on page 2 of appellees' brief will confirm that approximately two-thirds of the purchase price was allocated to land and improvements, all of which is real property.

formed. Appellees' cases apply only when the cause of action is based on *no* written agreement. The very material they cite demonstrates that this is true. (Appellees' Br. 28-29). The statute may sometimes be disregarded, they say, "[w]here one has acted to his detriment solely in reliance on an oral agreement * * *." (Appellees' Br. 28). That clearly is not this case.†

Appellees signed the writing required by the statute of frauds. The statute requires that they be bound by the writing signed. Yet appellees urge, and the District Court found, that they did not intend to agree with the duration of the option provided in the writing. If appellees' position is accepted and the finding of the District Court is true, appellees did not agree to the only option the statute of frauds would allow the District Court to find.

Nor have appellees answered appellants' argument that the parol evidence rule prevents a finding that the minds of the parties met on an April 30, 1959, termination date. At one point, they suggest that the parol evidence rule does not apply because the real agreement was made in Winslow. (Appellees' Br. 25). But an integrated document was admittedly signed in Albuquerque on September 23. (*Ibid.*; Ex. 3 (R. 1423)).

Elsewhere in their brief, appellees say that the District Court could vary the termination date provided in the letter because there are ambiguities in the letter, that is, ambiguities in other provisions.* (Appellees' Br. 26, 29). Termination date bears strongly on time of "participation," (Br. 15-17, 22, 26-27; *supra* p. 3), but it is not the same. Appellees cannot and do not contend that it is. Ambiguity in "participation" does not open the door to rewriting the balance of the letter. (Br. 20-21).

†Appellees address themselves to an argument that the writing was insufficient to reflect any agreement reached. (Appellees' Br. 27-29). This argument is not in appellant's brief. Appellees fail to distinguish between an argument that the agreement is incomplete and an argument that the writing is incomplete.

*Appellees' reference, (Appellees' Br. 26), to an exchange between court and appellants' trial counsel to demonstrate that appellants have conceded an ambiguity in the final paragraph is inaccurate and misleading. See R. 233.

Finally, appellees have confusingly crossed out parts of the final paragraph of the letter, apparently in an attempt to demonstrate the existence of an ambiguity. (Appellees' Br. 25-26). The paragraph admittedly looks odd with fat black lines drawn through parts of it. But for all their efforts appellees have failed to demonstrate any ambiguity. Appellants do not argue that the letter agreement said that any option would be "open forever," only that this would be the effect of the termination provision as written. (Br. 15-17, 22, 26-27). Appellees cannot deny the latter.

Only if the final paragraph had been lopped off after the figure "1959" to read, "This option remains in force until April 30, 1959," would the finding of the District Court have been proper. As it is, parol evidence was used to vary and contradict an unambiguous term of the writing.* The District Court was influenced by an erroneous view of the law.

Appellees suggest that the District Court properly disregarded the parol evidence rule because Maurice Liberman drafted the September 23 letter. (Appellees' Br. 29). They assume a non-existent ambiguity. (*Ibid.*).

"Courts may not permit a party to strain the construction of the contract to establish an ambiguity merely to invoke the rule of resolution against the drafter." *Central Casualty Co. v. Neuman Transit Co.*, 203 F. Supp. 413, 414 (D. Wyo. 1962).

As for Cox's testimony that the option would not be automatically extended, (Appellees' Br. 26), the statute of frauds and the parol evidence rule prevent using it to vary and contradict the writing. In any case, it is inherently incredible. The testimony is contradicted by the plain terms of the writing and by every statement Maurice Liberman made on the subject. (Ex. 3 (R. 1423)); (R. 797-799, 832-833, 976, 1580-1582, 1726). And Cox is appellees' attorney of record. Robert Jenkins, Mrs.

*Appellees, in an aside, (Appellees' Br. 29), suggest that appellants should have specified error on the admission of evidence. The parol evidence rule is not an exclusionary rule of evidence but a rule of substantive law. See Br. 20.

Nagel, and Maurice Liberman all stated that they understood the final paragraph of Exhibit 3 to provide the termination date of any option to which they were bound. (R. 394, 797-799, 832-833, 976, 1580-1582, 1726, 1854-1857, 1932-1934; Br. 15-28). Cox's testimony could not, then, be the basis for a finding that appellees understood and that appellants knew or had reason to know that appellees understood that any option granted would expire April 30, 1959.

Appellees have not even attempted to face up to *Bradley v. Industrial Comm'n.*, 51 Ariz. 291, 76 P.2d 745 (1938), and *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649 (1892). (Br. 23).

Actually, appellees knew they were getting an option they could keep open forever. Any such option to participate after the initial purchase at the initial purchase terms was too good to be true. (Br. 23-28).

Second, any agreement made in Albuquerque was void for vagueness. (Br. 7, 8, 11-15, 28-30; Appellees' Br. 23-24, 29-30).

The evidence is undisputed that ownership and operation, and the sharing of costs, profits, and losses of the lumber mill, half of which appellees claim a right to buy, were never actually worked out. (R. 283-293, 330-338, 361-367, 383-384, 389-392, 436-439, 796-797, 844-845, 882-885, 897-898, 935-936, 1546-1547, 1843-1857, 1884-1888, 1916-1929; Br. 10-15, 28-30). Appellees do not deny this; they cannot. (Appellees' Br. 24; see the material quoted at Br. 11-12, 14, 29).

Appellees now place their reliance on implied terms. (Appellees' Br. 23-24, 29-30). In *Chafin v. Main Island Creek Coal Co.*, 85 W. Va. 459, 102 S.E. 291, 293 (1920) (Appellees' Br. 23), cited in appellees' brief, plaintiff claimed one-half the difference between the \$27,200 sellers of land asked and the \$25,000 for which he was able to get it for defendants. There were no details of ownership, operation, costs, profits, and losses to be implied there. In *Boyer v. Bowles*, 310 Mass. 134, 37 N.E. 2d 489 (1941) (Appellees' Br. 24), the parties had in fact operated a business

together for a period of at least ten years. The "conduct of the parties" during this lengthy period allowed the Massachusetts court to imply the terms of their relationship. (310 Mass. 134, 37 N.E. 2d at 494). Appellees' cases are not to the point.

Moreover, here appellees themselves could not agree on what terms they would imply. Jenkins thought appellants would get all the profit from their own timber. (R. 1924; Br. 14). But this was not Mrs. Nagel's understanding, so she said. (R. 291-292, 1886).

Appellees concede that the details of ownership, operation, and the sharing of costs, profits, and losses were not expressly agreed upon. (Appellees' Br. 24). Actually, ownership, operation, and the sharing of costs, profits, and losses were not agreed upon at all. (Br. 10-15, 28-30). They cannot be implied. Yet appellees claim \$429,883.40 for not being allowed to participate in ownership, operation, costs, profits, and losses of the Winslow mill. This is error.

Third, appellees did not accept appellants' entire offer. (Br. 7, 8, 30-32; Appellees' Br. 30).

The evidence is undisputed that appellees intended the right to buy appellants out in seven years' time to be part of any understanding the parties can be held to have reached. (R. 282-283, 329, 339-340, 383, 396-397, 446-447, 800-801, 1838-1839, 1850, 1856, 1921; Br. 30-32, 47-48). Appellees do not deny this. (Appellees' Br. 3, 30). Mrs. Nagel did not sign the September 24 letter. (Ex. H (R. 1756)). Appellees now argue that Mrs. Nagel should be allowed to accept part and reject part of appellants' offer because the entire offer did not correspond with what appellees allege were the terms of the understanding. But appellees rely on no finding of the District Court to support their argument. The District Court did not even have the September 24 letter in mind. (Br. 30-32). Nor could the missing finding be made. (See Ex. H (R. 1756)). It is impossible on reading the September 24 letter to see why appellees did not sign it. But they didn't. There was no acceptance.

3. The Award Was Grossly in Excess of the Value of One-Half the Mill Minus the Contract Price.

(Br. 7, 8, 32-36; Appellees' Br. 35-36, 38-39).

Appellees do not deny that the value of one-half the mill was in the neighborhood of \$250,000. The price appellees would have had to pay to purchase a half interest under their alleged contract was \$325,000. Thus, their contract price was \$75,000 *more* than their own undisputed testimony of the value of the one-half interest. (Br. 54). Obviously the \$429,883.40 awarded to appellees was much, much greater than the *minus* \$75,000 which represents the difference between appellees' cost of performance and the value of one-half the mill. Only one question remains: Can the present value of the profits reasonably expected to be earned from ownership of one-half the mill be over half a million dollars more than the negative difference between appellees' cost of performance and the value of one-half the mill? In other words, can the present value of the anticipated profits to be derived from the subject property be vastly in excess of the present value of the property itself minus the contract price? The answer to this question is certainly "no," as we shall demonstrate.

4. The Present Value of Profits Reasonably Expected to Be Earned from Ownership of One-Half the Mill Cannot Be Substantially Greater Than the Excess, if Any, of the Market Value of the Property Over the Contract Price.

(Br. 7, 9, 36-41; Appellees' Br. 35-36).

The evidence is undisputed that \$429,883.40 is much greater than the excess, if any there were, of the market value of one-half the mill (\$250,000) over the contract price (\$325,000). (R. 312, 319, 327, 333-335, 375-378, 430-435, 439-442, 966-967, 1091-1092, 1497, 1641, 1723-1725, 1828-1832, 1882, 1904-1908, 1913-1915, 1920); (Ex. C); (Br. 33, 34-36, 54). Appellees do not deny this. (Appellees' Br. 35-36). Neither did the court below. The District Court refused to make any finding concerning the market value of one-half the Winslow mill. Appellees do not deny this. They believe, as the District Court believed, that

the benefit of a bargain to purchase something can properly be measured by estimating, projecting, and discounting net revenues without any regard for market value and without comparing market value and contract price. (Appellees' Br. 35-36).

It is this fallacious theory and a misplaced reliance upon one Arizona decision (*Martin v. La Fon*) which have led the District Court into awarding a judgment which was grossly excessive.

But computing the present value of the net revenues reasonably expected to be received from operating the mill, before adjusting for depreciation, is simply one method of computing the market value of the Winslow mill. If, as appellees argue, (Appellees' Br. 50), contract price is properly reflected in the adjustment for depreciation, the present value of future profits, that is, net revenues adjusted for depreciation, cannot exceed the difference between market value and contract price. If it does (and appellees acknowledge that in this case it does) there must be a difference between actual market value and computed market value (and appellees acknowledge that in this case there is). In any such case, there must be error in the computation. (Br. 36-41).

Appellees to the contrary, (Appellees' Br. 36), there is nothing "wholly illogical" about this. Short-term leases, life interests, future interests, and lumber mills, (R. 137-138), are all valued by projecting and discounting anticipated net revenues reasonably certain to be received. *Martin v. La Fon*, 55 Ariz. 196, 100 P.2d 182 (1940); (Br. 39-40). This is a recognized but risky method of valuing investment property. Wixon, Accountants' Handbook 18.3 (4th ed. 1957); (Br. 39).

The language appellees quote from *Martin v. La Fon*, 55 Ariz. 196, 100 P.2d 182, 184 (1940) (Appellees' Br. 36), supports appellants' logical argument. *Evidence of profits is evidence of value.*

Appellees concede that the award greatly exceeded the difference, if any, between contract price and market value. (Appellees' Br. 35-36). Appellants have demonstrated here and in their opening brief that any such award is clearly erroneous (Br. 36-41).

Moreover, appellees misstate their principal case. The Arizona court in *Martin v. La Fon* did not recognize that "a recovery of five times the purchase price for loss of profits would be proper." (Appellees' Br. 36). The case came up on appeal from the granting of a motion to strike allegations that profits would be earned. (55 Ariz. 196, 100 P.2d at 183).

As for any "'real estate theory,'" (Appellees' Br. 38), appellants do not know whom appellees are quoting or what they mean. Benefit of bargain equals the difference between contract price and present value *no matter what is being purchased*. (Br. 32-34).

5. The District Court Failed to Take Into Account the Full Cost of Appellees' Performance.

(Br. 7, 9, 41-43; Appellees' Br. 49-51).

Appellants are aware and have acknowledged that there was an adjustment for depreciation in the computation on which the District Court purported to base its award. (Br. 41). The District Court awarded appellees \$429,883.40 as profits it found they would have earned by owning one-half the Gallagher mill. Appellees have paid nothing. None of their money is tied up. The effect of the District Court's award will be that appellants will have paid \$650,000 to net what the District Court found to be \$429,883.40. Appellants are bearing the burden of an investment from which appellees are awarded profits. The District Court failed to consider this. (R. 155-156; Appellees' Br. 50-51).

6. Future Profits Were Not Bargained for.

(Br. 7, 9, 43-54; Appellees' Br. 34-35, 36-39).

Appellees recognize that special damages in excess of the difference between contract price and market value can be awarded only if bargained for. (Appellees' Br. 38-39). Once again, they cite the same carefully excerpted portion of Maurice Liberman's testimony to support the contention that he was bargaining for future profits. (Appellees' Br. 34). The full text of the interchange appears at pages 49 through 51 of appellants' opening

brief. It will not support the finding that Maurice Liberman was bargaining with appellees for future operating profits. And appellees do not and cannot quote any statement they made to show that *they* were bargaining for future profits. This is essential. Appellees have not distinguished the cases cited by appellants. (*Compare* Br. 45-46, 52-53 *with* Appellees' Br. 38). Appellees were bargaining for the position in the forest represented by the Gallagher mill. (See the material quoted at Br. 47-48). A finding that future profits were bargained for was error.

Whatever appellees now say that position in the forest means, (Appellees' Br. 37), at the time they were bargaining for the position they knew what they meant. (Br. 47-51). The definition of position in appellees' brief is correct: "'Position' is acquired by owning and *operating* a mill supplied by Forest Service timber." (Appellees' Br. 37). The question is, which mill? The material quoted from the transcript at pages 47 through 48 of appellants' opening brief demonstrates that appellees wanted the Gallagher mill after 1965, not to operate it, but to shut it down. They needed to do this to decrease competition for Government timber to keep *their own mill* operating:

"Mrs. Nagel: Oh, I told him that we needed the timber after the Aztec was cut for *our* mill to make a paying operation." (R. 282-283) (Emphasis supplied.) (Br. 61; see material quoted Br. 47-48).

Appellees do not deny that Robert Jenkins included the value of the position in his best estimate that the entire Gallagher mill was worth \$500,000. (Br. 54).

7. The District Court Erred in Computing Anticipated Profits.

(Br. 7, 9-10, 54-62; Appellees' Br. 39-58).

First, profits projected from the milling of "Future Forest Service Timber" are speculative and hypothetical. (Br. 56-60; Appellees' Br. 52-55).

Appellees have filled out the portion of their brief dealing with the District Court's computation of damages with lengthy expository passages in which they review quantities of uncontroverted material. The District Court's complicated computation is correctly and succinctly summarized at pages 55 and 56 of appellants' opening brief. Appellees cannot and do not take exception to appellants' summary. Appellees must have been loath to come to grips with this Court's opinion in *Peters v. Lines*, 275 F.2d 919, 931 (9th Cir. 1960). Their reluctance to proceed is understandable, for, so far as future timber is concerned, *Peters v. Lines* is this case. (Br. 58-60).

This Court recently held in *Peters v. Lines* that timber not under contract must be disregarded in computing damages based on loss of anticipated profits *even though* a market is assured* and *even though* there is additional timber in the area which the parties contemplate will be acquired. (Br. 58-59). This holding is in conformity with lumber industry practice, including appellees' own practice. When appellees settled their accounts with the Government they computed depreciation only on the timber they had under firm contract. They disregarded any timber they might acquire in the future. (Br. 57-58).

Appellees state that, "There is the difference of night and day between the proof of future damages in *Peters* and in the instant case." (Appellees' Br. 54). They then proceed to skirmish with arguments appellants do not put forward.† What appellees cannot get round is that *Peters v. Lines* holds that timber not under

*In *Peters v. Lines*, a market for a 91-month period was assured. Milling company and logging company had a requirements contract. (275 F.2d at 922; Br. 58-59). Not even appellees' economic consultant could do that well for them. (Appellees' Br. 41-42).

†(1) Appellants do not argue that the award resulted from a mathematical error. (Appellees' Br. 54).

(2) No "woods operation" is in issue here. (Appellees' Br. 54).

(3) No "truck earnings" are in issue here. (Appellees' Br. 54).

(4) Appellants do not argue from *Peters v. Lines* that Nagel's accountants' reports are incorrect. (Appellees' Br. 54).

(5) Appellants do not argue from *Peters v. Lines* that probability of some profit does not exist. (See p. 13, *infra*). (Appellees' Br. 54).

contract cannot be used in a projection of future profits reasonably certain to be earned.

Dahl Kirkpatrick testified only that there was additional timber in the area which might or might not come onto the market between 1960 and 1973, depending upon future Forest Service policy, fire, and the activities of tree destroying pests. (R. 457-498). As in *Peters v. Lines*, there was additional timber in the area which the parties hoped to buy. (275 F.2d at 929, 931); (Appellees' Br. 55).

The Code of Federal Regulations requires that the Forest Service timber, if sold, be sold to the highest bidder. (36 C.F.R. §§ 221.8, 221.10). Kirkpatrick did not testify that the Winslow mill "could have acquired additional timber." (R. 461-498; Br. 58). But if he had, he could not have done so meaningfully. (36 C.F.R. §§ 221.8, 221.10). Any award based on testimony that the Winslow mill could, with *any* certainty, have acquired additional timber would be based on proposed unlawful conduct by the Forest Service. Any such award could not stand.*

What appellees, at least in their brief, (Appellees' Br. 39-40, 52-53, 58), ignore, is that they would still receive \$142,649.15 on an anticipated profits theory if "Future Forest Service Timber" were eliminated from the stretched-out projection.† (Br. 60)

Second, it was error to project profits too far into the future. (Br. 60-61; Appellees' Br. 55-58).

*Appellees argue that since 1942, with only one exception, every sale from the Chevalon working circle has gone to the two mills in Winslow. What they do not point out is that from 1942 through 1950 every sale went to *one* mill. Since 1950 every sale has gone to *two* mills (R. 264-267). In 1962 every sale may go to *three* mills. (R. 138-140, 1036; Br. 57-58). Moreover, any practice of bidding on every other sale, (Appellees' Br. 44), would never survive the timber depletion caused by the Aztec cut. (Br. 46-47).

†Even timber under firm contract is in large measure speculative and hypothetical. (Br. 57). See, e.g., *Russell & Pugh Lumber Co. v. United States*, 290 F.2d 938, 941-942 (Ct. Cl. 1961) (holding that 20% deficiency on a 100% government cruise was not a "major deficiency").

In *Palmer v. Connecticut Ry. & L. Co.*, 311 U.S. 544 (1941), and *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941) (Br. 60-61; Appellees' Br. 55-58), the parties had a relationship for a fixed term. In each case, anticipated profits were awarded for less than the fixed term. Here appellants were interested in the mill for only seven years. After that period, appellees wanted it to shut it down (R. 282-283, 329, 339-340, 383, 396-397, 446-447, 800-801, 1838-1839, 1850, 1856, 1921; Br. 60-61). There was no agreement to operate the mill together, but if there had been, it would have been for a period of not more than seven years. (Br. 61). It was error to project anticipated profits over more than twice that period.

That the fifteen-year period selected by the District Court is excessive is demonstrated by the fact that the award is vastly in excess of any difference between the \$325,000 appellees would have had to pay and the market value of one-half the mill. Under a proper projection the award would have equaled the difference, if any, between \$325,000 and the market value of one-half the mill.

Third, it was error not to adjust milling profit per thousand board feet milled to reflect inevitable increases in fixed costs. (Br. 61-62; Appellees' Br. 51).

Appellees argue that the District Court properly failed to make any adjustment in its milling profit per thousand as annual production slipped from 30,000,000 to a little over 10,000,000 board feet annually over the fifteen-year projection. (Appellees' Br. 51). They cite some rebuttal testimony by Robert Jenkins to support the untenable position that fixed costs will not vary with the level of production. But what needs rebutting is appellees' consistent testimony that they needed the Gallagher mill to decrease competition for government timber after 1965 to make their own substantially identical mill a "paying operation." (R. 283; Br. 61-62). The profit squeeze caused by dwindling timber supplies and rising costs is what this case is all about. (R. 282-283, 329, 383, 396-398, 446-447, 800-801, 1838-1839, 1856, 1921; see material quoted at Br. 46-48).

CONCLUSION

The brief of appellees is inaccurate and misleading. Appellees have misstated the case and appellants' argument. (Appellees' Br. 3, 4, 15, 18, 25, 27, 29, 35, 49). For a correct statement of the case and of appellants' argument, see appellants' opening brief.

For the reasons here summarized and discussed more fully in appellants' opening brief, the judgment should be reversed and the case remanded either with directions to enter judgment for appellants or for new trial.

Dated: June 27, 1962.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF CONFORMANCE

I hereby certify that I have examined the provisions of Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief conforms with the requirements of said Rules.

BURNHAM ENERSEN



No. 17642

In the
United States Court of Appeals
For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK
GREVEY, co-partners, d.b.a. DUKE CITY LUM-
BER COMPANY, and DUKE CITY LUMBER COM-
PANY, a partnership,

Appellants.

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT
T. JENKINS and GEORGIA MAE JENKINS, gen-
eral partners, and GEORGIA MAE JENKINS,
Trustee for JAMES HENRY NAGEL, limited
partner, d.b.a. NAGEL LUMBER & TIMBER
COMPANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited part-
nership,

Appellees.

Petition for Rehearing

(with Suggestion for Rehearing en Banc)

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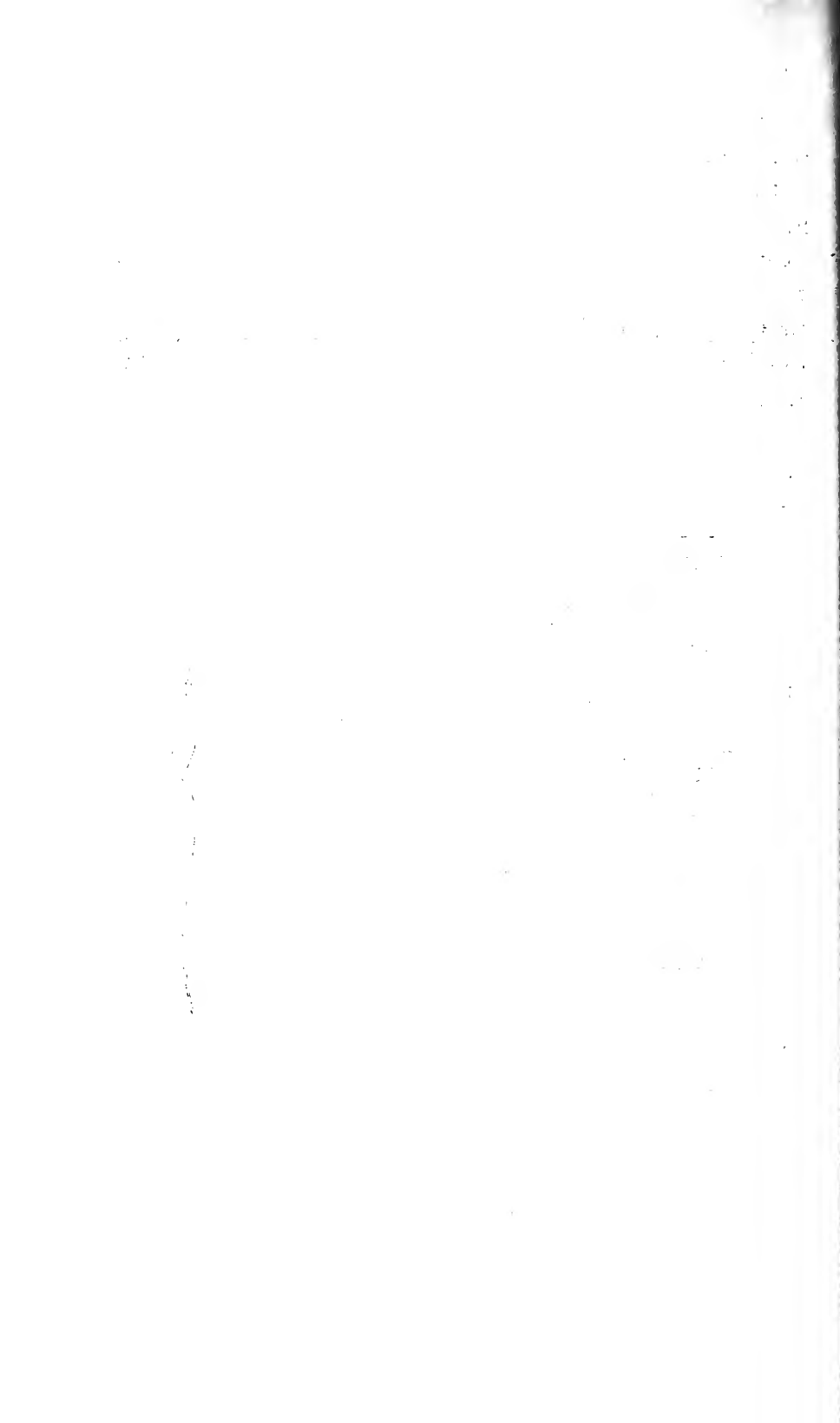
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Appellants respectfully ask for a rehearing of this appeal upon each of the following grounds:

First, in affirming the judgment "in all respects" this Court has failed to correct a clearly apparent, mathematical error in the computation of the "loss of anticipated profits" which the court below awarded to appellees as damages. This error lies in the omission of any deduction for the "interest cost" of the money which appellees would have had to invest in the purchase of the business if they had been permitted to join in its purchase. The trial court did deduct the interest due to the Gallaghers (the previous owners, from whom appellants were buying the property) upon the deferred instalments of the purchase price (R. 154-155; Finding 19(e), R. 193). The trial court concluded, however, that after the purchase price was actually paid to the Gallaghers it would be recovered by appellees through "depreciation" (R. 155), and for that reason the trial court did not deduct the appellees' share of the purchase price, as such, in computing their net damages.

But even if the purchase price itself should ultimately be recovered by appellees through depreciation (a most optimistic assumption), there would inevitably be a substantial time-lag between the date of each payment by appellees on the purchase price and the date of appellees' recovery of the payment by way of depreciation. During that time-lag appellees' money would be tied up in this business and not earning interest or other income elsewhere in some other form of investment. (This earning power of funds is often called "interest cost" or "cost of money".)

In computing appellees' net loss, the trial court made no allowance for the earning power or interest cost of appellees' money during the time the money was to have been invested in this business. The trial court expressly so stated (R. 158-159).

The trial court did, quite properly, make an allowance, at the rate of 6% per annum, for the interest cost of the money appellees would have had to provide as "working capital" to operate the

business. This is stated by the trial court in its Memorandum (R. 197), as quoted at pages 11 and 12 of this Court's printed opinion herein. Clearly it was error not to make a similar allowance for the interest cost of the money to be used in paying the purchase price itself.

This error is one which can be readily corrected by this Court upon the present record and without the necessity of referring the case back to the trial court for further proceedings. The amount of this interest cost, converted to a present value basis, is \$44,812.00, computed as follows:

	①	②	③	④	⑤	⑥
Year	Nagels' Investment Per Plaintiffs' Exhibits 4 and 11	Recovery by Nagels Via Depreciation at \$3.57 Per M Per Finding 19(f)	Nagels' Net Investment or Net Recovery During the Year (Col. 1 minus Col. 2)	Nagels' Cumulative Net Investment at Year-End	Interest Cost of Nagels' Net Cumulative Investment for the Year at 6%	Present Value of Col. (5) Per Finding 19(f) Discount Formula
1958.....	\$ 5,417		\$ 5,417	\$ 5,417	\$ 27	\$ 27
1959.....	65,000	\$53,550	11,450	16,867	1,012	1,012
1960.....	65,000	53,550	11,450	28,317	1,699	1,699
1961.....	65,000	53,550	11,450	39,767	2,386	2,294
1962.....	140,338	53,550	86,788	126,555	7,593	7,020
1963.....	59,583	53,550	6,033	132,588	7,955	7,072
1964.....		28,649	(28,649)	103,939	6,236	5,331
1965.....		21,554	(21,554)	82,385	4,943	4,063
1966.....		21,554	(21,554)	60,831	3,650	2,885
1967.....		21,554	(21,554)	39,277	2,357	1,791
1968.....	75,338	21,554	53,784	93,061	5,584	4,080
1969.....		18,641	(18,641)	74,420	4,465	3,137
1970.....		18,641	(18,641)	55,779	3,347	2,261
1971.....		18,641	(18,641)	37,138	2,228	1,447
1972.....		18,641	(18,641)	18,497	1,110	693
1973.....		18,641	(18,641)			
						<u>\$44,812</u>

Column (1) shows the amount appellees would have had to pay each year upon the purchase price of the property according to the contract (Pl. Ex. 4, § 4, page 7). It also includes appellees' share of the cost of replacing fully depreciated equipment at the end of each of the years 1961 and 1967, as shown in appellees'

depreciation schedule (Pl. Ex. 11; R. 1441), which was approved by the trial court (R. 198; Opinion herein, page 12). (These figures do not include (a) working capital, the interest cost of which is already covered in the trial court's computation or (b) interest on the deferred instalments of the purchase price, which also is already covered in the trial court's computation.) Column (2) shows the amounts of money which the trial court assumed appellees would recover each year by way of depreciation at the court's computed rate of \$3.57 per thousand board feet of lumber processed during the year as determined in Finding 19(f) (R. 194). Column (3) is the net amount of money required of the appellees each year—viz., the year's cash outlay or investment minus the year's recovery, or Column (1) minus Column (2). Column (4) is the cumulative sum of the annual amounts appearing in Column (3), thus showing the net amount of money of appellees which would remain invested in the business at the end of each year. The interest cost of this amount of money for the year is shown in Column (5), using the same 6% rate which the trial court used in computing the interest cost of the necessary working capital. In Column (6) these yearly interest costs are reduced to present value as of the judgment date, using the same discount formula which the trial court used in converting future profits to present value in Finding 19(f) (R. 194).

The sum of Column (6)—\$44,812.00—is the present value of the interest cost of funds appellees would have had to invest in the business (over and above working capital and over and above interest on the deferred instalments of the purchase price) in order to purchase and own half of the business. This interest cost represents the present value of each dollar of appellees' money invested in the business for the period between the date of that dollar's investment in the business and the date of its recovery through depreciation.

The judgment should be corrected by deducting this \$44,812.00 from the \$429,883.40 awarded. The amount of the corrected judgment would be \$385,071.40.

Second, in rejecting the standard rule of damages for breach of contract for the sale of property, measured by the excess of the value of the property over the contract price, and approving instead an entirely new rule of damages, measured by estimates of profits which could be made by operating the property as a business, this Court ignored—it did not even notice or mention, let alone discuss or evaluate—the following:

(a) The utter absence of any evidence that the appellees were bargaining for a business operation.

(b) Appellees' own repeated, consistent and unqualified testimony that what they were bargaining for was to eliminate the competition represented by the Gallagher mill and its "position in the forest," so that appellees' own existing mill (the Nagel Mill) could continue to operate profitably.

(c) The uncontradicted, unqualified, and unmistakable testimony of one of the plaintiffs-appellees (being the only valuation evidence in the record) that the reasonable value of the entire Gallagher property, including its "position in the forest," at the critical time was \$500,000.00, which means that the half-interest here in dispute was reasonably worth \$250,000.00 and that the damage award of \$429,883.40 was almost twice the value of the disputed property.

(d) The trial court's weird assumption that the Gallagher mill would for fifteen years be able to secure a steady supply of raw material from the United States government by successfully bidding for Forest Service timber at future public sales.

(e) This Court's own opinion in *Peters v. Lines*, 275 F.2d 919 (1960), which disallowed an award of damages for profits to be realized from future processing of timber not under contract or option.

Third, in answering appellants' contention that appellees did not accept the entire offer because they did not accept appellants' second letter, dated September 24, 1958, giving appellees a seven-year option to purchase the whole mill at an appraised price, this Court said in part (Opinion herein, page 15):

“But the other findings and conclusions sufficiently reveal that the Trial Court believed that appellees already had that option by reason of the September 20 oral agreement and the September 23 letter.”

There is nothing—not a word, not even a syllable—in the Findings and Conclusions to justify that statement.

Because this Court's opinion abandons the normal rule for measuring damages for breach of contract to sell property according to the excess of value over contract price—and adopts instead a rule which allows recovery of almost double the value of the property itself without reference to or deduction of the contract price—we respectfully suggest that the appeal should be reheard en banc.

Dated: April 19, 1963.

Respectfully submitted,

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Of Counsel

CERTIFICATE

I hereby certify that in my judgment this petition for rehearing is well founded. I further certify that it is not interposed for delay.

BURNHAM ENERSEN

1870
1871
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Response to Petition for Rehearing

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Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT
T. JENKINS and GEORGIA MAE JENKINS, gen-
eral partners, and GEORGIA MAE JENKINS,
Trustee for JAMES HENRY NAGEL, limited
partner, d.b.a. NAGEL LUMBER & TIMBER
COMPANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited part-
nership,

Appellees.

Response to Petition for Rehearing

In conformity with the order entered herein May 1, 1963 appellees respectfully respond to the first point discussed in appellants' Petition for Rehearing.

The petition charges that "this Court has failed to correct a clearly apparent, mathematical error in the computation of the 'loss of anticipated profits' * * *." Appellants appear to be striving to bring themselves within the rule that a petition for rehearing serves the very limited purpose "of directing the attention of the court to some controlling matter of law or fact which a party claims was *overlooked* in deciding a case * * *." *Anderson v. Knox*, 9 Cir., 300 F.2d 296, 297 (1962). The rule also confines the petition "to a concise statement (without argument) of the matter which the petitioner asserts the court *overlooked*, together with such references to such pages of the opinion and of the record on appeal and to such authorities as will enable the court to determine whether the matter referred to was *overlooked* * * *." *Ibid.* (Emphasis added)

I

This Court cannot be charged with *overlooking* an "error" never called to its attention; such an "error" cannot be said to be "clearly apparent". The deduction for interest sought by the petition is now urged for the first time. It was not covered by any assignment of error. It was not argued in the briefs or orally. Until the filing of the petition for rehearing no question with regard to said deduction existed on the appeal. "Generally one may not enlarge the scope of an appeal in a petition for rehearing." *Higa v. Transocean Airlines*, 9 Cir., 230 F.2d 780, 786 (1956). "* * * it is too late to present a question for the first time on a petition for rehearing." *Bassick Mfg. Co. v. Adams Grease Gun Corporation*, 2 Cir., 54 F.2d 285 (1931).

Appellants state that the court below made a "mathematical error" in its computation of the "loss of anticipated profits"; and they say that this error lies in the "omission of any deduction for the 'interest cost' of the money which appellees would have had to invest in the purchase of the business if they had

been permitted to join in its purchase." Implicit in this statement is a representation that the court below found that a deduction for this item should be made but "omitted" doing so because of a "mathematical error", presumably through oversight or inadvertence. This representation is not correct. Appellants' present demand for an additional deduction for the interest cost of money was presented to the court below (R. 156-158), and was specifically rejected. This interest factor, as appears from the Memorandum Ruling (R. 196-198), had already been taken into account in fixing the profit figure of \$4.71 per thousand board feet.

The court found from the facts and concluded from the law that all proper interest deductions had been made. If the method adopted by the court was erroneous, it did not constitute a "mathematical error". Such alleged error can be reviewed on appeal only if the ruling is challenged by an assignment of error. When not so challenged, an appellant cannot and should not be permitted to raise the point for the first time after an adverse decision on appeal under the guise of an asserted "mathematical error".

II

Appellants' failure to timely and properly urge their demand for an additional interest deduction in itself is a sufficient reason for denying the petition. Even if considered on the merits, it should be denied.

The evidence shows there are only three categories for which interest deductions should be allowed: interest actually payable on the purchase price; interest on working capital; and interest on invested fixed capital. In arriving at its net profit figure of \$4.71 per thousand board feet the court made deductions for each category:

- (a) \$48,750, being the discounted present value of interest on the purchase price which the appellees would have

had to pay if they had been allowed to participate in the purchase;

(b) \$1.70 per thousand board feet, for interest at 6% on \$500,000 of working capital (R. 197: \$240,000 ÷ 140,956,000 board feet);

(c) \$.51 per thousand board feet, for the amount allowed as a deduction for interest paid by Nagels during the years 1952-59. (R. 197: \$72,000 ÷ 140,956,000 board feet).

In their petition appellants frankly acknowledge deductions were made for items (a) and (b), but "overlook" the deduction made for item (c). This deduction alone, computed on the total production of 266,565,000 board feet and reduced to present value, amounts to \$58,244.37. It exceeds the deduction sought on rehearing which, if given, would constitute a double deduction. As noted by the court, it would not be "sound in this particular instance". (R. 158)

The charge that this Court failed to correct a "clearly apparent, mathematical error" is without merit. There was no error in the court below which this Court overlooked or failed to correct—apparent, clearly apparent, mathematical, or at all. Interest deductions were fully allowed.

The judgment of the Trial Court should remain affirmed "in all respects".

Respectfully submitted,

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No. 17642

**United States
Court of Appeals
for the Ninth Circuit**

MAURICE LIBERMAN, ET AL,
Appellants,

vs.

GEORGE H. NAGEL, ET AL,
Appellees.

Transcript of Record

In Four Volumes

**VOLUME I.
(Pages 1 to 480, inclusive)**

**Appeal from the United States District Court for the
District of Arizona**

FILED
APR 3 1962

FRANK H. SCHMID, CLERK



No. 17642

United States
Court of Appeals

for the Ninth Circuit

MAURICE LIBERMAN, ET AL,
Appellants,

vs.

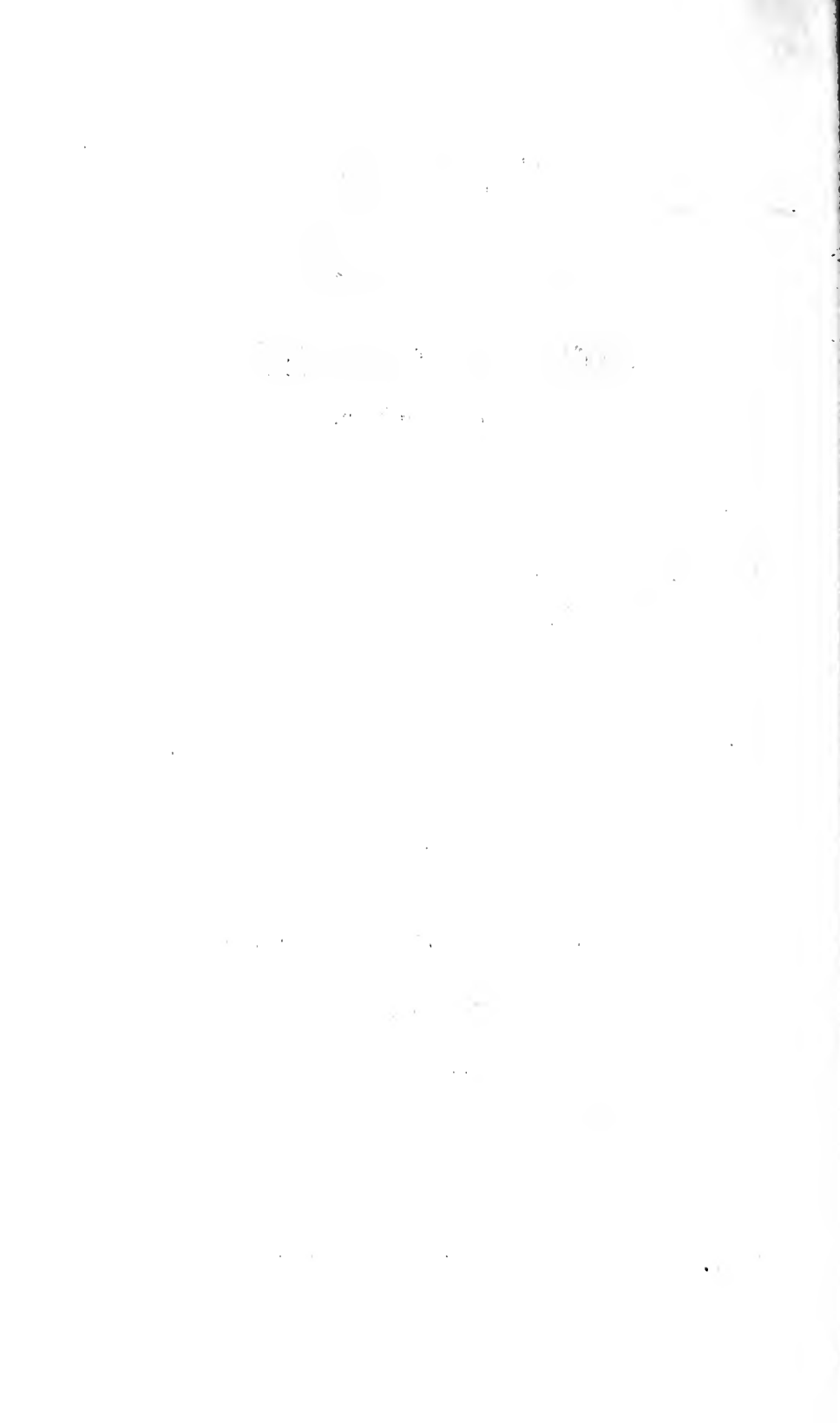
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District of Arizona



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	29
Amended Findings of Fact and Conclusions of Law:	
Filed June 20, 1961.	116
Filed July 28, 1961.	183
Amendment to Answer to Amended Complaint	41
Answer to Amended Complaint.	35
Answer to Complaint.	24
Answers to Interrogatories.	42
Appeal:	
Certificate of Clerk to Transcript of Record on	203
Notice of.	201
Statement of Points on (USCA).	1956
Stipulation and Order re Exhibits on (USCA)	1962
Certificate of Clerk to Transcript of Record. .	203
Comments of Mr. Enersen on Court's Findings	109

ii.

Complaint	17
Exhibit A—Letter, Sept. 23, 1958, Maurice Lieberman to Mrs. George H. Nagel....	22
Complaint, Amended	29
Decision	97
Docket Entries	3
Entry of Amended Judgment in Civil Docket, July 28, 1961.....	201
Findings of the Court.....	98
Findings of Fact and Conclusions of Law, Amended:	
Filed June 20, 1961.....	116
Filed July 28, 1961.....	183
Hearing on Motion and Defendants' Argument	144
Memorandum Ruling on Motions to Amend Findings, Conclusions and Judgment, etc.	196
Minute Order of June 20, 1961 Directing Clerk to Enter Judgment.....	130
Minute Order of July 28, 1961—Order on Motions	200
Motion for a New Trial as to Damages Alone	135
Affidavit of Arnold F. Wallen.....	136
Motion to Amend Findings, to Make Addi- tional Findings and to Amend Judgment, etc.	132
Names and Addresses of Attorneys.....	1

Notice of Appeal.....	201
Schedule Showing Computation by Court of Damages Sustained by Plaintiffs.....	108
Statement of Points Upon Which Appel- lants Intend to Rely (USCA).....	1956
Stipulation and Order re Exhibits to be Printed (USCA)	1962
Transcript of Comments of Mr. Enersen in re Findings of the Court, June 12, 1961.....	109
Transcript of Findings of the Court, June 12, 1961	98
Transcript of Hearing on Motion and Defend- ants' Argument, July 20, 1961.....	144
Transcript of Pre-Trial Hearing, Feb. 5, 1960	209
Transcript of Proceedings and Testimony....	256
Exhibits for Plaintiffs:	
1—Letter, Sept. 12, 1958, T. P. Gal- lagher to Maurice Liberman.....	1414
2—Copy of Telegram, Oct. 16, 1958, Mrs. George H. Nagel to Maurice Liber- man Declining to Release Options... ..	1422
3—Letter, Sept. 23, 1958, Maurice Liber- man to Mrs. George H. Nagel.....	1422
5—Letter, Aug. 9, 1957, Maurice Liber- man to T. P. Gallagher and five Let- ters Attached Representing Milling Agreement Between Duke City Lbr. Co. and Arizona Timber Co.....	1424

Transcript of Proceedings—(Continued):

Exhibits for Plaintiffs—(Continued):

6—Agreement, July 30, 1957, Duke City Lumber Co. and Arizona Timber Co. Representing Pooling Agreement.	1433
9—Schedule of Available Timber Including Timber Under Contract and Future Timber Under First Service Management Plan	1439
Admitted in Evidence.	622
10—Schedule: Plaintiffs' Computation of Operating Profit of Nagel Mill Before Deducting Depreciation.	1440
Admitted in Evidence.	624
11—Schedule: Plaintiffs' Computation of Depreciation of Winslow Mill.	1441
Admitted in Evidence.	626
12—Schedule: Plaintiffs' Computation of Projected Profit from Available Timber	1443
Admitted in Evidence.	627
13—Schedule: Plaintiffs' Computation of Production of Available Timber by Years, Showing Computation of Projected Profit Therefrom.	1444
Admitted in Evidence.	773

Transcript of Proceedings—(Continued):

Exhibits for Plaintiffs—(Continued):

14—Deposition of Maurice Liberman, Dec. 21, 1959.....	1604
Admitted in Evidence.....	957
17—Deposition of Maurice Liberman, Dec. 5, 1959.....	1445
Admitted in Evidence.....	957
21—National Forest Timber—Notice of Sale for Block of Timber in Chevalon Working Circle, May 21, 1960.....	1734
Admitted in Evidence.....	707
24—Letter, Feb. 11, 1959, Cox to Johnson	1738
Admitted in Evidence.....	1388
25—Letter, March 9, 1959, Cox to Johnson	1742
Admitted in Evidence.....	1389
26—Letter, March 28, 1959, Johnson to Cox	1743
Admitted in Evidence.....	1389

Exhibits for Defendants:

A—Flow Sheet Prepared by Dale Nelson Showing Cash Requirement for Pur- chase of Winslow Mill by Nagel Lbr. & Timber Co.....	1745
Admitted in Evidence.....	324

Transcript of Proceedings—(Continued):

Exhibits for Defendants—(Continued):

B—Loan Agreement, May 15, 1956, Nagel Lumber & Timber Co. and Valley National Bank	1747
Admitted in Evidence.....	323
H—Letter, Sept. 24, 1958, Maurice Liberman to Mrs. George H. Nagel.....	1756
Admitted in Evidence.....	848
P—Schedule: Defendants' Analysis and Adjustment of Computations Shown on Pls. Ex. 10-12.....	1757
Admitted in Evidence.....	1277
Q—Schedule: Defendants' Analysis of Computations and Adjustments Shown on Pls. Ex. 12.....	1760
Admitted in Evidence.....	1265
AA—Deposition of Mrs. George H. Nagel	1762
Admitted in Evidence.....	1391
AB—Deposition of Robert Thomas Jenkins	1892
Admitted in Evidence.....	1391
Motion for Dismissal (Mr. Moore).....	1411
Motion for Leave to Amend Answer to De- fendants (Mr. Moore).....	1410

Transcript of Proceedings—(Continued):

Witnesses:

Brunell, Donald A.

—direct	499
—cross	526
—redirect	535
—recalled, cross	562
—redirect	582, 586
—recross	586

Cavanaugh, Thomas

—direct	605
—cross	617
—recalled, direct	1088
—cross	1121, 1131
—redirect	1180, 1183
—recross	1182, 1184

Cox, James J., Jr.

—direct	1392
---------------	------

Grevey, Joseph

—direct	1185
—cross	1210
—redirect	1222, 1224
—recross	1223

Transcript of Proceedings—(Continued):
 Witnesses—(Continued):

Hickman, Lyle

—direct	985
—cross	993
—redirect	1005
—recross	1005

Jenkins, Robert T.

—direct	370, 417
—cross	429
—redirect	452
—recalled, redirect	540
—recross	556
—recalled, direct	1401
—cross	1407

Johnson, Bryan

—direct	1368
—cross	1375

Kirkpatrick, Dahl Y.

—direct	457
—cross	479, 486
—redirect	493

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Lieberman, Maurice

—direct	773, 832
—cross	848, 902
—redirect	957, 964
—voir dire	963
—recross	979

Nagel, Mrs. George H.

—direct	262
—cross	308
—redirect	369
—recross	370

Nelson, Dale O.

—direct	670
—cross	683
—redirect	685
—recross	688
—recalled, cross	692
—redirect	701
—recross	702

Rosenthal, Joseph

—direct	1224, 1265, 1273
—voir dire	1262
—cross	1277
—redirect	1343, 1367
—recross	1352

Transcript of Proceedings—(Continued):
 Witnesses—(Continued):

Smith, Kenneth

—direct	629
—cross	649
—redirect	666, 668, 669
—recross	668

Steward, Andy

—direct	1009
—cross	1015

Stilb, John

—direct	765
—cross	768
—redirect	771

Weinstein, Yale

—direct	711
—cross	751, 757
—redirect	763
—recross	765
—recalled, direct	981, 1017
—cross	1034, 1058
—redirect	1080, 1086
—recross	1082, 1087

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In the District Court of the United States
for the District of Arizona

No. Civ. 610 Pct.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT T. JENKINS and GEORGIA MAE JENKINS, general partners, and GEORGIA MAE JENKINS, trustee for James Henry Nagel, limited partner, doing business as Nagel Lumber & Timber Company, a limited partnership; and NAGEL LUMBER & TIMBER COMPANY, a limited partnership,
Plaintiffs,

vs.

MAURICE LIBERMAN, JOSEPH GREVEY and JACK GREVEY, co-partners doing business as Duke City Lumber Company; and DUKE CITY LUMBER COMPANY, a partnership,
Defendants.

DOCKET ENTRIES

1959

Apr. 29—1. File Plaintiffs' Complaint.

Apr. 29—2. File Plaintiffs' Request for Appointment of Private Process Server and Memorandum of Appointment.

Apr. 29—Issue summons.

Apr. 30—3. File Plaintiffs' Request for Appointment of Private Process Server and Memorandum of Appointment.

1959—(Continued)

June 30—4. File defts' Answer.

July 14—5. File Plaintiffs' Notice of Hearing on Motion to Set for Trial without a Jury.

July 14—Order set for trial at Tucson before the Court on December 22, 1959, at ten a.m.

July 14—Mail notice of trial setting to all counsel.

July 16—Order vacate trial setting on December 22, 1959, at Tucson, and order reset for trial at Tucson on February 16, 1960, at ten a.m.

July 16—Mail notice to counsel.

1960

Jan. 15—6. File Plaintiffs' Amended Complaint.

Jan. 26—It is ordered that a pretrial hearing in this case is set for February 9, 1960 at 10:00 a.m., at Prescott.

Jan. 26—Mail notice to counsel.

Jan. 29—7. File Plaintiffs' Interrogatories.

Feb. 2—Order that pre-trial hearing in this cause set for Feb. 9, 1960 at Prescott is vacated and the pre-trial hearing is set for Friday, Feb. 5, 1960 at 1:30 p.m. at Tucson.

Feb. 2—Counsel notified by Judge Walsh on 2/1/60.

Feb. 4—8. File Pltfs' Motion for Production of Documents, and Notice of Hearing for Fri. Feb. 5, 1960 at 1:30 p.m. at Tucson.

1960—(Continued)

- Feb. 5—For pre-trial hearing. Elias Romley, Philip Robbins & James J. Cox, Jr. appear for pltfs; Rex Moore, B. G. Johnson & A. J. Pfister for defts. Pre-trial hearing had. Defts.' objections to pltfs.' interrogatories & defts' objections to pltfs' mo. for production of documents argued & taken under advisement.
- Feb. 5—9. File defts.' Objections to Plaintiffs' Written Interrogatories.
- Feb. 5—10. File Deposition of Maurice Liberman Vol. I.
- Feb. 5—11. File Deposition of Maurice Liberman Vol. II.
- Feb. 5—12. File Deposition of Yale Weinstein.
- Feb. 5—13. File Deposition of Robin Bishop.
- Feb. 5—14. File Deposition of Thomas Cavanaugh.
- Feb. 6—Defts.' objections to pltfs' interrogatories 4, 5, 11, 14(a), (c) & (d), 15(b) & (c), 22, 23, 25, 26, 36, 37, 38, 39, 40, 44 & 45 overruled. Remaining objections sustained. As to interrogatories 36, 37, 38, 39, 40 & 44 answers required only to extent that it is possible for defts. to procure accurate answers in time to permit filing on Feb. 16, 1960. Plts. mo. for production of documents granted subject to ability of defts.

1960—(Continued)

Feb. 6—(Continued)

to locate, prepare & transport to Tucson by Feb. 16, 1960. Court orders issues of liability & damages will not be severed but will be tried at one time.

Feb. 6—Counsel notified by telephone and copy of minute entry of this date mailed to counsel.

Feb. 9—15. File Reporter's Transcript of Pre-Trial hearing on Feb. 5, 1960.

Feb. 10—Ent. Order trial continued from Feb. 16, 1960 to Feb. 18, 1960.

Feb. 10—Counsel notified.

Feb. 10—16. File Deposition of Robert Thomas Jenkins.

Feb. 10—17. File Deposition of Mrs. George H. Nagel.

1960—(Continued)

Feb. 12—On mo. of A. J. Pfister, ent. Order time of defts. in which to answer pl'tfs.' written interrogatories extended until 2/23/60 at 10.00 a.m. and ent. fur. Order time of defts. within which to produce documents requested by pl'tfs. extended until 2/23/60 at 10:00 a.m.

1960—(Continued)

Feb. 12—Counsel notified by telephone of today's entry.

Feb. 15—18. File deft's. Answer to Amended Complaint.

Feb. 16—Ent. Order trial setting on Feb. 18, 1960 is vacated and ent. Order case reset for trial on Feb. 23, 1960, at 10:00 a.m.

Feb. 17—On stip. of counsel, trial setting on Feb. 23, 1960 is vacated & case reset for trial on Mar. 28, 1960, at 9:30 a.m.

Feb. 18—Mail notice to counsel case reset for trial on Mar. 28, 1960.

Feb. 25—19. File defts.' Answers to Interrogatories of pltfs.

Mar. 23—Ent. Order trial setting for Mar. 28, 1960, and case reset for trial May 3, 1960, at 9:30 a.m. at Tucson.

Mar. 23—Mail notice to counsel case reset for trial on May 3, 1960.

May 2—20. File Deposition of Joseph Rosenthal.

May 3—For trial. Elias Romley, Philip Robbins, Jr., & James J. Cox, Jr., appears for pltfs; Rex Moore, B. G. Johnson & A. J. Pfister for defts. Purs. to stipulation of counsel pltfs.' exhibits 1 thru 6 admitted. Ent. proceedings of trial. Defts.' exhibits A & B admitted. at 4:30 P.M.

1960—(Continued)

May 3—(Continued)

ent. Order continue to May 4, 1960 at 9:30 a.m.

May 4—At 9:30 a.m., the parties & all counsel pres. purs. to recess, ent. fur. proceedings of trial. Defts.' C & pltfs.' 8 and 7a to 7i, incl. admitted. At 4:20 P.M., ent. Order recess to May 5, 1960 at 9:30 a.m.

May 5—The parties & counsel pres. purs. to recess, ent. fur. proceedings of trial. Pltfs.' exhibits 9 thru 12 admitted. At 4:30 p.m., ent. Order recess to May 6, 1960 at 9:30 a.m.

May 6—The parties & counsel being pres., ent. fur. proceedings of trial. Pltfs.' exhibits 20 & 21 admitted. Counsel for defts. moves to dismiss and for judgment. Ruling reserved. Defts.' exhibits D, E & F and pltfs.' exhibit 13 admitted. At 4:20 P.M., ent. Order recess to May 10, 1960 at 9:30 a.m.

May 10—All parties & counsel pres., ent. fur. proceedings of trial. Defts.' exhibits G & H and pltfs' exhibits 22, 14 admitted in evidence. At 4:20 P.M. ent. Order recess to May 11, 1960, at 9:30 a.m.

1960—(Continued)

May 11—The parties & counsel pres., ent. fur. proceedings of trial. Defts.' exhibits I, J, & K admitted in evidence. On stip. of counsel, ent. Order release defts.' M for iden. to counsel for pltf. for overnight use. At 4:30 P.M. ent. Order recess to 10:15 a.m., May 12, 1960.

May 12—The parties & counsel pres. ent. fur. proceedings of trial. Defts.' exhibits O & Q admitted in evidence. Ent. Order permit counsel for defts to withdraw defts.' W for ident. overnight. At 4:30 P.M., ent. Order recess to May 13, 1960, at 9:30 a.m.

May 13—The parties & counsel pres., ent. fur. proceedings of trial. Counsel for defts. moves to quash subpoena duces tecum. Motion argued. Ent. Order quashing said subpoena. Defts.' exhibits X, Y, P, z, aa & ab and pltf's' exhibits 24, 25 & 26 admitted. Ent. Order grant. defts.' motion to amend answer. Ent. Order deny. defts.' renewed motion for judgment dismissing complaint. Ent. Order allow. pltf's. 15 days to file open. brief; defts. 30 days thereafter to file ans. brief; & pltf's. 15 days to file reply brief. Upon filing of reply brief, matter will stand submitted.

1960—(Continued)

May 13—21. File Memorandum re Inadmissibility of Telephone Conversation Between Maurice Liberman and Joseph Grevey on Oct. 16, 1958.

May 18—22. File defts' Amendment to Answer to Amended Complaint.

June 17—Ent. Order extend time for filing pltfs' opening memo. to & includ. 6/17/60. & for filing defts' ans. memo. to & including 7/23/60.

June 20—Mail notice to counsel of entry of 6/17/60.

Sept. 9—It is ordered that the time for filing defendants' answering brief is extended to and including September 9, 1960.

Dec. 30—23. File Pltf's Opening Memorandum.

Dec. 30—24. File Defendant's Answering Brief.

Dec. 30—25. File Pltfs' Reply (Answering) Memorandum.

Dec. 30—26. File Decision in favor of pltfs and against defts. findings pltfs' damages in sum of \$367,615.00.

1961

Jan. 4—Enter order that pltfs may have to and incl Jan 16 1961 to lodge and serve proposed findings and conclusions; that defts may have thru Jan 31 1961 to lodge and serve their objections or exceptions thereto and their proposed additional findings and conclusions, if any.

1961—(Continued)

Jan. 4—Mail notice to counsel of order of 1/4/61.

May 9—Order that Defendants' Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law and on Defendants' Proposed Findings and Conclusions is set for June 12, 1961, at Tucson, Arizona, at eleven o'clock a.m.

May 11—Mail notice to all counsel.

June 12—Defts.' Objections to Pltfs' Proposed Findings of Fact and Conclusions of Law and Defts' Proposed Findings and Conclusions for hearing. Elias Romley, Philip A. Robbins and James Cox appear for pltfs; B. G. Johnson & A. J. Pfister for defts. On mo. A. J. Pfister, ent. Order as sociate Burnham Enersen as counsel for defts. Hearing had. Ent. Order overrule defts' objections to pltfs' proposed findings of fact & conclusions of law. Ent. Order defts' proposed findings & conclusions rejected. Ent. Order counsel for pltfs. prepare final draft of findings of fact & conclusions of law in accordance with Court's suggestions.

June 12—27. File Plaintiffs' Trial Memorandum.

June 12—28. File Defendants' Trial Memorandum.

June 12—29. File Memo. Re Admissibility of Telephone Conversations between Maurice Liberman & Joseph Grevey on Oct. 16, 1958.

1961—(Continued)

- June 20—30. File Reporter's Transcript of trial Proceedings in 8 Vols. (30A, 30B, 30C, 30D, 30E, 30F, 30G & 30H).
- June 20—31. File pltfs' Proposed Findings of Fact and Conclusions of Law.
- June 20—32. Docket defts' Objections to pltfs' Proposed Findings of Fact and Conclusions of Law filed at Phoenix on January 31, 1961.
- June 20—33. Docket Defendants' Proposed Findings of Fact and Conclusions of Law filed at Phoenix on Jan. 31, 1961.
- June 20—34. File Findings of Fact and Conclusions of Law.
- June 20—The Clerk is directed to enter judgment forthwith in favor of the pltfs. and against the defts. and each of them for the sum of \$367,565.61 with int. thereon at 6% per annum from this date until paid. The Court will also file and place among the exhibits in the cause the enlarged copy now delivered to the Clerk of the schedule set forth on page 10 of the Findings of Fact and Conclusions of Law.
- June 20—35. File Schedule Showing Computation by Court of Damages Sustained by pltfs.

1961—(Continued)

June 20—Enter judgment for the pltfs. George H. Nagel, Mabel J. Nagel, Robert T. Jenkins & Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, Trustee for James Henry Nagel, limited partner, dba Nagel Lumber & Timber Company, a limited partnership, and Nagel Lumber & Timber Company, a limited partnership and against the defendants Maurice Liberman, Joseph Grevey & Jack Grevey, copartners dba Duke City Lumber Company, and Duke City Lumber Company, a partnership, in the sum of \$367,565.61 with int. thereon at 6% per annum from this date until pd. 6/20/61.

June 20—Mail notice to counsel of entry of judgment.

June 29—36. File Defts' Motion to Amend Findings, to Make Additional Findings and to Amend Judgment, and Motion for a new Trial as to Damages Alone. (Docketed 7/5/61 at Tucson).

June 29—37. File Affidavit of Service of Deft's Mo. to Amend Findings, etc. (Docketed 7/5/61 at Tucson).

1961—(Continued)

June 30—38. File Pltfs' Motion to Amend the Findings of Fact and Conclusions of Law and to Amend Judgment. (Docketed 7/5/61 at Tucson).

June 30—39. File Plaintiffs' Bill of Costs.

July 5—40. File Memorandum in Opposition to Defendants' Motion to Amend the Findings, etc., and for a New Trial as to Damages Alone.

July 5—It is ordered that oral argument on defendant's Motion to Amend Findings, to Make Additional Findings and to Amend the Judgment; and defendants' Motion for New Trial as to Damages Alone; and plaintiffs' Motion to Amend the Findings and Conclusions and Judgment is set for July 20, 1961, at 9:30 A.M. at Prescott, Arizona.

July 5—Mail notice to all counsel.

July 20—Elias Romley and James J. Cox, Jr., appear for pltfs. Burnham Enersen, B.G. Johnson and A.J. Pfister appear for defts. Defts' Mo. for Amendment of Findings with respect to all matters, except the matter of damages, submitted on memorandum. Defts' Mo. for a New Trial on question of damages argued, submitted. Pltfs' Motion to Amend the Findings and

1961—(Continued)

July 20—(Continued)

Conclusions and Judgment argued and submitted.

July 28—41. File Court's Memorandum Ruling on Motions of Both Parties to Amend the Findings and Conclusions and to Amend the Judgment and on Defendants' Motion for Additional Findings and Motion for New Trial as to Damages.

July 28—Order grant Defts' Motion to Amend Finding of Fact No. 14(b), page 7, line 7, and with that exception, order deny Motion of Defts. to Amend Findings of Fact, to make additional findings of fact, and to amend judgment. Order deny Defts' Motion for a New Trial as to the Issue of Damages Alone. Order grant Plaintiffs' Motion to Amend the Findings of Fact and Conclusions of Law and to Amend the Judgment. Order Clerk is directed to enter an amended judgment forthwith that plaintiffs recover from the defendants the sum of \$429,883.40 with interest at the rate of 6% per annum from June 20, 1961 until paid.

July 28—42. Enter and file Amended Findings of Fact and Conclusions of Law.

July 28—Copies of Court's Memorandum Ruling and Amended Findings of Fact and Con-

1961—(Continued)

July 28—(Continued)

clusions of Law mailed to counsel by
Judge Walsh.

July 28—Enter Amended Judgment for the plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins and Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, Trustee for James Henry Nagel, limited partner, doing business as Nagel Lumber & Timber Company, a limited partnership, and Nagel Lumber & Timber Company, a limited partnership, against the defendants Maurice Liberman, Joseph Grevey and Jack Grevey, co-partners, doing business as Duke City Lumber Company, and Duke City Lumber Company, a partnership, in the sum of \$429,883.40, with interest thereon at the rate of 6% per annum from June 20, 1961, until paid. 7/28/61.

July 28—Mail notice to counsel of entry of judgment, as amended.

Aug. 4—Costs taxed for pltfs. at \$2,103.13 as claimed.

Aug. 4—Amended judgment, and costs, entered in J.D.

Aug. 21—43. File Stipulation concerning deposit of \$460,000 Time Certificate of Deposit as supersedeas bond on appeal.

1961—(Continued)

Aug. 25—44. File Defendants' Notice of Appeal.

Aug. 25—45. File Defendants' Designation of Contents of Record on Appeal.

Aug. 25—Copy of notice of appeal mailed to Moore & Romley and to James J. Cox, Jr.

Aug. 28—46. File Transcript of Hearing on Motion and Defendants' Argument.

Aug. 28—47. File Transcript of Comments of Mr. Enersen in the Findings of the Court.

Aug. 28—48. File Transcript of Findings of the Court.

Sept. 11—49. File Stipulation that Clerk of the Court may make corrections in Motion and Defendants' Argument dated July 20, 1961 and in trial transcript.

Oct. 3—50. Enter and File Order Extending Time to file Record on appeal and docket appeal to and including Nov. 18, 1961.

Nov. 16—51. Enter and file Order Extending Time to file record on appeal and docket appeal to and including Nov. 23, 1961.

[Title of District Court and Cause.]

COMPLAINT

For their claim and cause of action against the defendants, plaintiffs allege:

I.

At all times herein mentioned:

(a) Plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins and Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, trustee for James Henry Nagel, limited partner, were and they now are the sole members of a limited partnership existing under the laws of the State of Arizona and doing business as Nagel Lumber & Timber Company; and all of said members and James Henry Nagel are citizens and residents of the State of Arizona. Plaintiff Nagel Lumber & Timber Company was and it now is a limited partnership composed of the general partners and the limited partner above named.

(b) Defendants Maurice Liberman, Joseph Grevey and Jack Grevey were and they now are the sole members of a partnership existing under the laws of the State of New Mexico and doing business as Duke City Lumber Company; and all of said members are citizens and residents of the State of New Mexico. Defendant Duke City Lumber Company was and it now is a partnership composed of the partners above named.

II.

The matter in controversy herein, exclusive of interest and costs, exceeds the sum of \$10,000.00.

III.

At all times herein mentioned plaintiffs were and they now are engaged in the operation of a business enterprise consisting of the purchase of standing

timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public.

IV.

At all times herein mentioned and on and prior to September 23, 1958, the New Mexico Timber Company, a New Mexico corporation, the Arizona Timber Company, an Arizona corporation, and the Bernalillo Lumber Company, a partnership consisting of A. I. Kaplan and T. P. Gallagher, partners, owned and engaged in the business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public. For simplicity, said corporations and partnership collectively hereinafter will be called "the Gallagher Companies" and said business enterprise hereinafter will be called the "Gallagher Properties."

V.

For many years prior to September 23, 1958, plaintiffs and the Gallagher Companies had an agreement whereby, in the event either the plaintiffs or the Gallagher Companies offered for sale either of their respective above described business enterprises, the other party would have the right of first refusal to purchase the business enterprise so offered for sale. During 1958 and shortly prior

to September 23, 1958 the Gallagher Companies did offer the Gallagher Properties for sale. Pursuant to said agreement plaintiffs and the Gallagher Companies were actively engaged in negotiations for the purchase of the Gallagher Properties.

VI.

On or about September 20, 1958 defendants contacted plaintiffs, acknowledged that they knew of plaintiffs' aforesaid first refusal agreement with the Gallagher Companies for the purchase of the Gallagher Properties, and stated that defendants desired to purchase said Properties but were unable to negotiate a purchase and sale because of plaintiffs' rights. Defendants thereupon proposed to plaintiffs that if plaintiffs would release the Gallagher Companies from their first refusal agreement defendants would undertake to purchase said Gallagher Properties and in the event of such purchase plaintiffs would have an option to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants, on the same terms and conditions as provided for by defendants' purchase from the Gallagher Companies, one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies. Plaintiffs and defendants agreed that said option would remain in force until April 30, 1959 and would be automatically extended for 6-month periods unless cancelled by mutual consent. Plaintiffs accepted the aforesaid proposal made to

them by defendants and immediately released the Gallagher Companies from their first refusal agreement.

The aforesaid agreement between plaintiffs and defendants was reduced to writing in the form of a letter prepared by defendants, a true copy of which, marked "Exhibit A" is hereto attached and referred to and by such reference made a part hereof.

VII.

Defendants thereupon commenced negotiations with the Gallagher Companies for the purchase of the Gallagher Properties and consummated said negotiations on or about November 20, 1958 at which time the Gallagher Companies agreed to sell and defendants agreed to purchase said Gallagher Properties. Thereafter defendants went into possession of the Gallagher Properties, all of which are located in the State of Arizona, and they ever since have been and now are in possession thereof.

VIII.

Plaintiffs have advised defendants that they have elected to exercise their option to purchase said undivided one-half interest in the Gallagher Properties and plaintiffs have offered to pay one-half of the purchase price in the same manner, at the same times, and upon the same terms and conditions as provided for in the purchase by defendants from the Gallagher Companies. At the time of so electing, plaintiffs were ready, able and willing to consummate the purchase of said one-half interest.

IX.

Without just or any cause defendants refused, and they now refuse, to recognize the right of plaintiffs to exercise said option and to acquire said undivided one-half interest on the aforesaid terms, considerations and conditions, or at all.

X.

As the result of defendants' aforesaid refusal and of the breach by defendants of their agreement entered into on September 23, 1958 as aforesaid, the plaintiffs have been and now are damaged in the sum of \$975,000.00.

Wherefore, plaintiffs pray judgment against defendants and each of them in the sum of \$975,000.00 together with their costs herein incurred.

MOORE & ROMLEY,
/s/ By ELIAS M. ROMLEY,
Attorneys for Plaintiffs.

EXHIBIT A
September 23, 1958

Mrs. George H. Nagel
Nagel Lumber & Timber Company
Winslow, Arizona

Dear Mrs. Nagel:

It is our understanding that you have a "first refusal agreement" with Arizona Timber Company to buy out their Plant at Winslow; and, if you turn

Exhibit A—(Continued)

down this option it is our understanding that we are second in line to buy the Plant.

It is now mutually agreed that in case either of us (and by this is meant, the companies controlled by the Liberman Group as one party; and the Nagel Lumber and Timber Company or any company controlled by the Nagel Family as the second party) will take-up the proposition made by Arizona Timber Company and buy out the Winslow Plant from them, then our companies will have the option to participate in that purchase on a fifty-fifty basis at the same terms as the purchaser will get from the Arizona Timber Company.

This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.

Very truly yours,

MAURICE LIBERMAN

Maurice Liberman

Liberman Group

By: MAURICE LIBERMAN

Nagel Family

By: ROBERT T. JENKINS

ML:rb

[Endorsed]: Filed April 29, 1959.

[Title of District Court and Cause.]

ANSWER

Come Now the defendants and for their answer to plaintiffs' complaint admit, deny and allege as follows:

First Defense

I.

Defendants allege that said complaint fails to state a claim upon which relief may be granted as against these defendants or any of them.

Second Defense

I.

Answering Paragraph I thereof, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation with respect to the partnership alleged in sub-paragraph (a) thereof but do admit that there is a partnership or other legal entity doing business in the State of Arizona as Nagel Lumber & Timber Company and admit the allegations of sub-paragraph (b) thereof.

II.

Defendants admit the allegations of Paragraph II thereof.

III.

Answering Paragraph III thereof, defendants admit that Nagel Lumber & Timber Company is

engaged in the business therein alleged but defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that all of the plaintiffs are so engaged in that business.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs IV and V thereof except that defendants admit that some time during 1958 certain timber properties were offered for sale by the alleged "Gallagher Companies."

V.

Defendants deny the allegations of Paragraph VI thereof except that defendants admit that a so-called letter agreement dated September 23, 1958, was signed by defendant Maurice Liberman and plaintiff Robert T. Jenkins and in this connection defendants allege that plaintiffs have released and discharged the defendants from any obligation which may have existed under the terms of said letter agreement.

VI.

Answering Paragraph VII thereof, defendants admit that on or about the 6th day of November, 1958, defendants Maurice Liberman, Joseph Grevey and Jack Grevey entered into an agreement to purchase certain properties and assets from the "Gallagher Companies" and that defendants are now in possession of said properties and assets.

VII.

Answering Paragraph VIII thereof, defendants admit that plaintiffs are now attempting to exercise a purported option to purchase a one-half (1/2) interest in the properties and assets purchased by defendants Liberman and Grevey as aforesaid from the "Gallagher Companies"; deny the remaining allegations of said paragraph and in this connection allege that prior to purchasing said properties and assets from the "Gallagher Companies" and making the necessary financial commitments to consummate said purchase, defendants Liberman and Grevey advised plaintiffs of said pending purchase and requested plaintiffs to exercise their option if they desired to do so and make the necessary financial commitments to assume one-half (1/2) of the obligations in connection with said purchase, all in accordance with the terms and provisions of said letter agreement dated September 23, 1958, and that plaintiffs failed, neglected and refused so to do.

VIII.

Defendants deny the allegations of Paragraphs IX and X thereof.

IX.

Defendants deny each and every, all and singular, the allegations of said complaint which are not hereinabove expressly admitted or otherwise pleaded to.

Third Defense

I.

As and for a separate defense to said complaint, defendants allege that the alleged agreement herein sued upon by plaintiffs was without any consideration whatsoever.

Fourth Defense

I.

As and for a further and separate defense to said complaint, and in the alternative, defendants allege that they have performed all of the conditions upon their part to be performed in accordance with said letter agreement.

Fifth Defense

I.

As and for a further and separate defense, defendants allege that prior to entering into the agreement to purchase certain properties and assets from the "Gallagher Companies," hereinabove referred to, defendants advised plaintiffs of the pending purchase agreement and of the terms and conditions thereof; that defendants requested plaintiffs to participate in said purchase under the aforesaid letter agreement of September 23, 1958, if and in the event plaintiffs desired to exercise their claimed

option thereunder; that defendants were advised by plaintiffs that they did not desire to exercise said option and participate in said purchase and that they could not make the necessary financial commitments to participate in said purchase; that thereafter and in reliance thereon defendants made the necessary financial commitments in order to consummate the purchase of said properties and assets from the "Gallagher Companies" and that plaintiffs are now estopped to maintain this action and assert any rights under said letter agreement of September 23, 1958.

Wherefore, having fully answered said complaint, defendants pray that plaintiffs take nothing thereby and that defendants may be discharged with their costs herein incurred and expended.

JENNINGS, STROUSS, SALMON
& TRASK,

/s/ By REX H. MOORE,

/s/ WILLIAM T. BIRMINGHAM,
Attorneys for Defendants.

Notice of Mailing Attached.

[Endorsed]: Filed June 30, 1959.

[Title of District Court and Cause.]

AMENDED COMPLAINT

For their claim and cause of action against the defendants, plaintiffs allege:

I.

At all times herein mentioned:

(a) Plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins and Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, trustee for James Henry Nagel, limited partner, were and they now are the sole members of a limited partnership existing under the laws of the State of Arizona and doing business as Nagel Lumber & Timber Company; and all of the said members and James Henry Nagel are citizens and residents of the State of Arizona. Plaintiff Nagel Lumber & Timber Company was and it now is a limited partnership composed of the general partners and the limited partner above named.

(b) Defendants Maurice Liberman, Joseph Grevey and Jack Grevey were and they now are the sole members of a partnership existing under the laws of the State of New Mexico and doing business as Duke City Lumber Company; and all of said members are citizens and residents of the State of New Mexico. Defendant Duke City Lumber Company was and it now is a partnership composed of the partners above named.

II.

The matter in controversy herein, exclusive of interest and costs, exceeds the sum of \$10,000.00.

III.

At all times herein mentioned plaintiffs were and they now are engaged in the operation of a business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public.

IV.

At all times herein mentioned and on and prior to September 23, 1958, the New Mexico Timber Company, a New Mexico corporation, the Arizona Timber Company, an Arizona corporation, and the Bernalillo Lumber Company, a partnership consisting of A. I. Kaplan and T. P. Gallagher, partners, owned and engaged in the business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public. For simplicity, said corporations and partnership collectively hereinafter will be called "the Gallagher Companies" and said business enterprise hereinafter will be called the "Gallagher Properties."

V.

For many years prior to September 23, 1958, plaintiffs and the Gallagher Companies had an agreement whereby, in the event either the plaintiffs or the Gallagher Companies offered for sale either of their respective above described business enterprises, the other party would have the right of first refusal to purchase the business enterprise so offered for sale. During 1958 and shortly prior to September 23, 1958 the Gallagher Companies did offer the Gallagher Properties for sale. Pursuant to said agreement plaintiffs and the Gallagher Companies were actively engaged in negotiations for the purchase of the Gallagher Properties.

VI.

On or about September 20, 1958 defendants contacted plaintiffs, acknowledged that they knew of plaintiffs aforesaid first refusal agreement with the Gallagher Companies for the purchase of the Gallagher Properties, and stated that defendants desired to purchase said Properties but were unable to negotiate a purchase and sale because of plaintiffs' rights. For the purpose of inducing plaintiffs to give up their aforesaid right of first refusal, defendants thereupon proposed and represented to plaintiffs that if plaintiffs would release the Gallagher Companies from their first refusal agreement defendants would undertake to purchase said Gallagher Properties and in the event of such purchase plaintiffs would have an option to purchase

from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants, on the same terms and conditions as provided for by defendants' purchase from the Gallagher Companies, one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies. Relying upon the aforesaid representation of defendants, plaintiffs accepted the aforesaid proposal made to them by defendants on the condition, to which plaintiffs and defendants all agreed, that said option would remain in force until April 30, 1959. Plaintiffs thereupon released the Gallagher Companies from their first refusal agreement.

The aforesaid agreement between plaintiffs and defendants is evidenced by a letter prepared by defendants, a true copy of which, marked Exhibit "A," is hereto attached and referred to and by such reference made a part hereof.

VII.

At the time of making the aforesaid proposal and representation and entering into the aforesaid agreement, the defendants had no intention of performing their covenants and obligations thereunder. The plaintiffs were unaware of defendants' said intention and entered into the aforesaid agreement in good faith.

VIII.

Defendants thereupon commenced negotiations with the Gallagher Companies for the purchase of the Gallagher Properties and consummated said

negotiations on or about November 6, 1958 at which time the Gallagher Companies agreed to sell and defendants agreed to purchase said Gallagher Properties. Thereafter defendants went into possession of the Gallagher Properties, all of which are located in the State of Arizona, and they ever since have been and now are in possession thereof.

IX.

Prior to April 30, 1959 plaintiffs have advised defendants that they elected to exercise their option to purchase said undivided one-half interest in the Gallagher Properties and plaintiffs offered to pay one-half of the purchase price in the same manner and upon the same terms and conditions as provided for in the purchase by defendants from the Gallagher Companies. At the time of so electing, plaintiffs were ready, able and willing to consummate the purchase of said one-half interest.

X.

Without just or any cause defendants refused, and they now refuse, to recognize the right of plaintiffs to exercise said option and to acquire said undivided one-half interest on the aforesaid terms, considerations and conditions, or at all.

XI.

At the time of making the proposal and representation and entering into the agreement referred to in Paragraph VI hereof, the business enterprise herein referred to as the Gallagher Properties was

a going business earning and capable of earning substantial profits which the plaintiffs and defendants contemplated said business would continue to earn in the future.

XII.

As a result of all of the foregoing plaintiffs have been deprived of ownership of an undivided one-half interest in the aforesaid Gallagher Properties and have been, are now and in the future will be deprived of their rightful share of the profits reasonably certain to be derived from the ownership and operation of the aforesaid Gallagher Properties, all to plaintiffs' damage in the sum of \$1,330,000.00.

Wherefore, plaintiffs pray judgment against defendants and each of them in the sum of \$1,330,000.00 together with their costs herein incurred.

JAMES J. COX, JR.,
MOORE & ROMLEY,
/s/ By ELIAS M. ROMLEY,

Attorneys for Plaintiffs.

Acknowledgment of Receipt of Copy Attached.

[Note: Exhibit "A" is the same as Exhibit "A" set out at page 22-23.]

[Endorsed]: Filed January 15, 1960.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come Now the defendants and for their answer to plaintiffs' amended complaint, admit, deny and allege as follows:

First Defense

I.

Defendants allege that said amended complaint fails to state a claim upon which relief may be granted as against these defendants or any of them.

Second Defense

I.

Answering Paragraph I thereof, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the partnership alleged in sub-paragraph (a) thereof but do admit that there is a partnership or other legal entity doing business in the State of Arizona as Nagel Lumber & Timber Company and admit the allegations of sub-paragraph (b) thereof.

II.

Defendants admit the allegations of Paragraph II thereof.

III.

Answering Paragraph III thereof, defendants admit that Nagel Lumber & Timber Company is engaged in the business therein alleged but defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that all of the plaintiffs are so engaged in that business.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs IV and V thereof, except that defendants admit, upon information and belief, that prior to September 23, 1958, certain real property in and near Winslow, Arizona, and certain real estate and timber rights in the Sitgreaves National Forest, then owned by New Mexico Timber Company, Arizona Timber Company and Bernalillo Lumber Company were, from time to time, offered for sale.

V.

Defendants deny the allegations of Paragraph VI thereof, except that defendants admit that any proposals, negotiations, representations or agreements of the parties were intended by the parties to be, and actually were, reduced to writing in a letter dated September 23, 1958, duly signed by defendant Maurice Liberman and by plaintiff Robert T. Jenkins on behalf of himself and the other

plaintiffs; and in this connection, defendants allege that plaintiffs have released and discharged the defendants from any obligation which may have existed under the terms of said agreement.

VI.

Defendants deny the allegations of Paragraph VII thereof.

VII.

Answering Paragraph VIII thereof, defendants admit that on or about the 6th day of November, 1958, defendants Maurice Liberman, Joseph Grevey and Jack Grevey formalized an agreement to purchase certain properties and assets from New Mexico Timber Company. Arizona Timber Company and Bernalillo Lumber Company, and that defendants are now in possession of said properties and assets.

VIII.

Answering Paragraph IX thereof, defendants admit that plaintiffs are now attempting to exercise a purported option to purchase a one-half (1/2) interest in the properties and assets purchased by defendants Liberman and Grevey as aforesaid; deny the remaining allegations of said paragraph and in this connection allege that prior to purchasing said properties and assets and making the necessary financial commitments to consummate said purchase, defendants Liberman and Grevey advised plaintiffs

of said pending purchase and requested plaintiffs to exercise their option if they desired to do so and make the necessary financial commitments to assume one-half (1/2) of the obligations in connection with said purchase, all in accordance with the terms and provisions of said letter agreement dated September 23, 1958, and that plaintiffs failed, neglected and refused to do so.

IX.

Defendants deny the allegations of Paragraph X thereof.

X.

Answering Paragraph XI thereof, defendants admit that the saw mill and plant, which were among the assets purchased by the defendants, had been used in an operating business, and defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph.

XI.

Defendants deny the allegations of Paragraph XII thereof.

XII.

Defendants deny each and every, all and singular, the allegations of said amended complaint which are not hereinabove expressly admitted or otherwise pleaded to.

Third Defense

I.

As and for a further and separate defense, defendants allege that any proposals, negotiations, representations or agreements made by plaintiffs and defendants on or about September 20, 1958, were intended by the parties to, and actually were, reduced to writing in a letter dated September 23, 1958, (a true copy of which, marked "Exhibit "A," is attached to the complaint) and which said letter constituted an agreement between plaintiffs and defendants, and which was duly signed by Maurice Liberman on behalf of the defendants and by Robert T. Jenkins on behalf of and with the authority of plaintiffs; and defendants further allege that they have performed all of the conditions upon their part to be performed in accordance with said agreement.

Fourth Defense

I.

As and for a further and separate defense, defendants allege that prior to entering into the agreement to purchase the properties and assets referred to in Paragraph VII of their Second Defense herein, defendants advised plaintiffs of the pending purchase agreement and of the terms and conditions thereof; that defendants requested plaintiffs to participate in said purchase under the aforesaid letter agreement of September 23, 1958, if and in

the event plaintiffs desired to exercise their claimed option thereunder; that defendants were advised by plaintiffs that they did not desire to exercise said option and participate in said purchase and that they could not make the necessary financial commitments to participate in said purchase; that thereafter and in reliance thereon defendants made the necessary financial commitments in order to consummate the purchase of said properties and assets and that plaintiffs are now estopped to maintain this action and assert any rights under said letter agreement of September 23, 1958.

Wherefore, having fully answered said amended complaint, defendants pray that plaintiffs take nothing thereby and that defendants may be discharged with their costs herein incurred and expended.

JENNINGS, STROUSS, SALMON
& TRASK,

/s/ By REX H. MOORE,

/s/ A. J. PFISTER,

Attorneys for Defendants.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed February 15, 1960.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO AMENDED
COMPLAINT

Come Now the defendants and pursuant to leave of Court granted at the conclusion of the evidence in this cause, amend their answer to the plaintiffs' amended complaint by the addition of an additional Fifth Defense as follows:

Fifth Defense

I.

As and for a further and separate defense, and in the alternative, defendants allege that if plaintiffs are relying upon an oral agreement, which agreement is an alleged option for the purchase and sale of the "Gallagher properties" or an interest therein, then by reason of the Statute of Frauds, Arizona Revised Statutes Section 44-101, no action may be brought thereon unless there is a memorandum thereof signed by the parties sought to be charged; that the letter agreement of September 23rd attached to plaintiffs' amended complaint as "Exhibit A," which plaintiffs allege evidences the aforesaid oral agreement, is not a sufficient memorandum of said oral agreement to comply with the

Statute of Frauds in the event that plaintiffs are relying upon such an alleged oral agreement.

JENNINGS, STROUSS, SALMON
& TRASK,

/s/ By REX H. MOORE,

/s/ A. J. PFISTER,

Attorneys for Defendants.

Notice of Mailing Attached.

[Endorsed]: Filed May 18, 1960.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

The defendants, in answer to the Interrogatories propounded by plaintiffs, state:

4. Defendants also allege in their Fifth Defense to plaintiffs' complaint that defendants made "the necessary financial commitments in order to consummate the purchase of said properties and assets from the 'Gallagher Companies.'" State specifically and in detail the "financial commitments" referred to in said Fifth Defense.

Answer to Interrogatory No. 4: Defendants, in order to consummate the purchase of said properties, obligated themselves to perform all the terms and conditions of the contract to purchase, including a commitment to pay the sum of \$834,287.97. In addition to the direct commitments contained in

said contract, defendants had to appropriate from funds otherwise available for use in their business a sum in excess of \$500,000.00 in cash for working capital. To be sure of being able to meet the financial obligations of the purchase, defendants, on October 16, 1958, initiated negotiations with Albuquerque National Bank, for a firm commitment for a line of credit and orally obtained such commitment on or about October 20, 1958, which commitment was formally given to defendants on December 8, 1958, in the total amount of \$700,000.00 good for a period of one year.

5. Have the defendants, or either or any of them, made any financial commitments (other than those specified in answer to Interrogatory No. 4) connected in any manner whatsoever, directly or indirectly, with the purchase by defendants of the Gallagher Properties? If so, state specifically and in detail what financial commitments were so made.

Answer to Interrogatory No. 5: None other than those stated in answer to Interrogatory No. 4.

6. State specifically and in detail the date and amount of each payment made upon the purchase price or under the terms of the purchase contract of November 6, 1958 on account of the purchase by defendants of the Gallagher Properties.

Answer to Interrogatory No. 6: Answered in detail in the schedule attached hereto marked "Schedule Answering Interrogatory No. 6."

7. Was there any discussion or conversation involving Maurice Liberman, Joseph Grevey, Robert T. Jenkins and Dale Nelson, or any of said persons, in Albuquerque, New Mexico, on September 23, 1958, before, at the time of, or after the signing of the letter agreement dated on said date and attached to and made a part of plaintiffs' amended complaint? If so, state specifically and in detail, in chronological order if possible, what was said (or the substance thereof) by each of said persons.

Answer to Interrogatory No. 7: Joseph Grevey was not present at any discussion or conversation referred to in Interrogatory No. 7. Defendant Liberman does not recall any specific conversation, but does know that the agreement of September 23, 1958, was signed by Robert Jenkins without objection. In the afternoon of September 23, 1958, defendant Liberman received a telephone call from Dale Nelson in which Nelson stated that he and Jenkins were at the airport getting ready to leave, that they were in a hurry, that they had been to Gallagher's office and that Jenkins had told Gallagher they were not interested in the purchase and that Jenkins would call Liberman the following morning. As Mr. Jenkins was leaving the Duke City office he said in substance that he was then going to Mr. Gallagher's office and advise Mr. Gallagher that the Nagel interests were not financially able to buy the Winslow mill. Defendant Liberman recalls that at that point he stated in substance to Mr. Jenkins "don't tell Tom about our deal."

8. Were any notes or other written memoranda made of the conversations referred to in Interrogatory No. 7? If so, state specifically and in detail the following with regard thereto:

(a) When and by whom made.

(b) The date or dates of the making thereof.

(c) The person or persons now having possession of said notes or memoranda, and the present location thereof.

Answer to Interrogatory No. 8: No.

9. State whether the following document was mailed, on or about September 24, 1958, to Mrs. George H. Nagel by defendant Maurice Liberman or any of his agents or employees, viz:

“September 24, 1958

Personal

Mrs. George H. Nagel

Nagel Lumber and Timber Company

Winslow, Arizona

Dear Mrs. Nagel:

Concerning our letter of September 23, with reference to the sale of the Arizona Timber Company's plant at Winslow, this is to confirm our verbal statement to you.

It is our intention in case of our purchase of the plant, directly or through you, to operate it for a period of seven years. After that period we will be willing to sell it to you at a reasonable market price, based on the appraisal of experienced lumbermen, such as Mr. J. B. Edens.

Very truly yours,

/s/ M. L. Liberman

Maurice Liberman

LIBERMAN GROUP

By /s/ M. L. Liberman

NAGEL FAMILY

By

ML:rb"

Answer to Interrogatory No. 9: Yes, except that the initial "L" in the signature of Maurice Liberman is not correct.

10. Was there any discussion or conversation involving the defendants and Mabel J. Nagel and Robert T. Jenkins or any other person associated with Nagel Lumber and Timber Company, or involving either or any of said persons, concerning the letter set forth in Interrogatory No. 9? If so, state specifically and in detail:

(a) The date and place of each such discussion or conversation.

(b) Whether such discussion or conversation was by phone or in person.

(c) The persons present and the persons participating therein.

(d) The substance of such conversation or discussion, setting forth insofar as possible and in chronological order if possible what was said by each participant therein.

(e) Whether any notes or other written memoranda of such conversations or discussions were made at any time, stating when and by whom made, the person now having possession of the same and the present location thereof.

Answer to Interrogatory No. 10 (a), (b), (c) and (d): The only time the letter was discussed was in a telephone conversation between Robert Jenkins and Maurice Liberman on September 24, 1958, in which conversation Mr. Jenkins asked if Mr. Liberman would put in writing his verbal statement made on September 20, 1958, as to his future intentions with respect to the Winslow plant. Mr. Liberman said he would do so.

(e) All notes concerning this conversation have been furnished to plaintiffs.

11. Was there any discussion or conversation involving the defendants herein and Tom Gallagher, Jack Kaplan and A. I. Kaplan, or involving either or any of said persons, concerning in any manner whatsoever the Nagel Lumber and Timber Company's right of first refusal on a sale of the Gallagher Properties? If so, state specifically and in detail:

(a) The date and place of each such discussion or conversation.

(b) Whether such discussion or conversation was by phone or in person.

(c) The persons present and the persons participating therein.

(d) The substance of such conversation or discussion, setting forth insofar as possible in chronological order if possible what was said by each participant therein.

(e) Whether any notes or other written memoranda of such conversation or discussion was made at any time, stating when and by whom made, the person now having possession of the same and the present location thereof.

Answer to Interrogatory No. 11: Yes.

With Respect to Tom Gallagher:

(a) September 12, 1958, in Tom Gallagher's office at Albuquerque, New Mexico.

(b) The conversation was in person.

(c) Tom Gallagher, Maurice Liberman and Joseph Grevey were present.

(d) There was no discussion about the first refusal. The only comment made concerning the first refusal was a remark by Tom Gallagher that he would handle the matter with Mrs. Nagel in such manner that he would be free to conclude the deal covered by the letter of September 12, 1958.

(e) There is no written memoranda of anything said by Tom Gallagher concerning the first refusal except as contained in the letter proposal of September 12, 1958.

With Respect to Jack Kaplan:

(a) September 12, 1958, in Tom Gallagher's office in Albuquerque, New Mexico.

(b) By telephone.

(c) Tom Gallagher, Maurice Liberman and Joseph Grevey. Maurice Liberman talked on the telephone to Jack Kaplan.

(d) In the course of the telephone conversation between Jack Kaplan and Maurice Liberman, Jack Kaplan stated that he considered they did not have a commitment to Mrs. Nagel on a first refusal, but said that Tom Gallagher wanted to handle it in his own way and that was all right with him, but as far as he, Jack Kaplan, was concerned, it was a deal and he congratulated Maurice Liberman.

(e) With respect to the telephone conversation with Jack Kaplan concerning the first refusal, Maurice Liberman made notes of the telephone conversation which have been furnished to plaintiffs.

With Respect to A. I. Kaplan:

(a) Telephone conversation on September 22, 1958, between Maurice Liberman, from Albuquerque, New Mexico, to A. I. Kaplan in New York City.

(b) Telephone conversation.

(c) Only persons participating in telephone conversation were Maurice Liberman and A. I. Kaplan.

(d) Maurice Liberman called A. I. Kaplan to inquire what was going on and stated that the letter agreement of September 12, 1958, had been approved by Jack Kaplan, and Jack Kaplan had congratulated Maurice Liberman and had wished him a lot of luck, but subsequently thereto Tom Gallagher had sent word that the deal was off and Maurice Liberman had not been able to get in touch with either Jack Kaplan or Tom Gallagher. In this telephone conversation A. I. Kaplan said, in response to Mr. Liberman's inquiry as to what was going on, that Jack Kaplan had reminded A. I. Kaplan that two years previously A. I. Kaplan had given Tom Gallagher authority to give Mrs. Nagel priority in any sale of the Winslow plant. Mr. Liberman then asked A. I. Kaplan if Mrs. Nagel did not buy the Winslow plant would the deal of September 12, 1958, stand. A. I. Kaplan said that such deal would stand, but added that the proposal to Mrs. Nagel was \$600,000.00 for the plant and that if Mrs. Nagel refused to purchase on that basis they may want more money from the Liberman group than the \$500,000 figure.

(e) Maurice Liberman made notes of this telephone conversation during and immediately after the conversation. A copy of said notes has been furnished to plaintiff.

12. Are there now in existence and/or have there ever been in existence, to the knowledge of the defendants or either or any of them, any documents, records or other memoranda in writing (other than the documents referred to in the deposition of Maurice Liberman as the written proposals of September 11 and September 12, 1958, the option agreement of September 23, 1958 attached as Exhibit A to plaintiffs' amended complaint and the letter of September 24, 1958 referred to in Interrogatory No. 9) concerning in any manner whatsoever the Nagel Lumber and Timber Company's right of first refusal on a sale of the Gallagher Properties? If so, state specifically and in detail with regard to each such document, record or other written memoranda:

(a) The nature and contents thereof.

(b) The person now having possession of the same and the present location thereof.

Answer to Interrogatory No. 12: During January, 1960, defendant Maurice Liberman and Joseph Rosenthal were permitted by Jack Kaplan to look through his files in Mr. Kaplan's office, 115 Broadway, New York City, pertaining to the Winslow mill, but under specific instructions not to make copies of any documents or notes concerning the same. In this file, according to defendant Liberman's best recollection, there are references in certain letters and wires about a possible sale of the property to Mrs. Nagel. In substance, Gallagher told Jack Kaplan that there was an understanding

to give Mrs. Nagel the first opportunity to buy the mill and Jack Kaplan referred to this as a moral obligation on the part of Tom Gallagher.

13. Was there any discussion or conversation involving the defendants and Tom Gallagher, Jack Kaplan and A. I. Kaplan, or involving either or any of said persons, concerning in any manner whatsoever the agreement sued upon? If so, state specifically and in detail:

(a) The date and place of each such discussion or conversation.

(b) Whether such discussion or conversation was by phone or in person.

(c) The persons present and the persons participating therein.

(d) The substance of such conversation or discussion, setting forth insofar as possible in chronological order if possible what was said by each participant therein.

(e) Whether any notes or other written memoranda of such conversations or discussions were made at any time, stating when and by whom made, the person now having possession of the same and the present location thereof.

Answer to Interrogatory No. 13: No.

14. Do the defendants carry insurance on the Gallagher Properties? If so, state the following:

(a) With what company or companies said insurance is carried.

(b) With what agent or agents defendants dealt in the purchase of said insurance.

(c) What risks are covered by the insurance policies.

(d) What are the limits of liability of the insurance companies under said policies.

Answer to Interrogatory No. 14: Yes.

(a) Fire Insurance with Lumbermen's Underwriting Alliance Lloyd's of London; Equipment Insurance, with Firemen's Fund; Fleet Insurance, with Insurance Company of North America.

(c) Fire and extended coverage, vandalism, collision, theft, over-turn, etc.

(d) Fire Insurance:

Buildings.....	\$580,000.00
Fleet.....	143,000.00
Equipment.....	64,750.00

15. Do the defendants carry insurance on the Gallagher Properties which insures defendants from the risk of loss resulting from a cessation or stoppage of the operation of said properties? If so, state the following:

(a) What is the full risk which the insurance company assumes under such policy or policies.

(b) Does the insurance company carry a risk and agree to compensate defendants for the loss of profits sustained by such cessation or stoppage?

(c) For what sum or sums of profit will such policy or policies insure and on what basis, that is, day, week, month or year?

Answer to Interrogatory No. 15: Yes.

(b) Yes.

(c) From nothing to approximately \$15,000.00 per month, limited to a four-month period.

17. Have there ever been furnished to an insurance company or any other organization or person for insurance purposes any financial statement, profit and loss statement or other data covering the Gallagher Properties which establish or estimate or purport to establish or estimate profit and loss, operating expense or general accounting information with respect to the Gallagher Properties? If so, state for each such document the following:

(a) The date or dates and the contents thereof.

(b) The person preparing same.

(c) The person to whom furnished.

(d) The person now having possession of the same or any copies thereof and the present location thereof.

Answer to Interrogatory No. 17: Yes.

(a) May 17, 1959, Contents—see “Schedule Answering Interrogatory 17-A.”

(b) T. S. Cavanaugh, Albuquerque, New Mexico.

(c) John Edsell.

(d) T. S. Cavanaugh, Albuquerque, New Mexico.

21. Name, identify and describe in detail all books of accounting kept or maintained by defendants in which records of the operations of the Gallagher Properties are kept or included, stating the person now having possession of the same and the present location thereof.

Answer to Interrogatory No. 21: Defendants maintain a complete double entry set of books, integrated within the Duke City Lumber Company's records, the principal books of accounting being general ledger, journal register, voucher register, journal voucher, standard journal entries, cash receipts journal, payroll register, sales journal. All books are in possession of the defendants at Albuquerque, New Mexico, and under the supervision of T. S. Cavanaugh, Albuquerque, New Mexico.

22. On what basis of accounting are the books of the Duke City Lumber Company kept, that is, cash or accrual or variations thereof.

Answer to Interrogatory No. 22: Accrual.

23. On what basis of accounting are the books of the Duke City Lumber Company kept, that is, fiscal or calendar year; and, if on a fiscal year basis, what are the beginning and ending dates of the fiscal year?

Answer to Interrogatory No. 23: Fiscal year beginning February 1 and ending January 31.

24. Do the defendants keep separate books of account for or concerning the Gallagher Properties or any part thereof?

Answer to Interrogatory No. 24: Defendants do not keep separate books of account for or concerning the Gallagher Properties or any part thereof, but defendants keep separate records concerning the sales, transfers, production and payroll.

25. What is the most recent period for which the defendants have a financial statement for the Duke City Lumber Company?

Answer to Interrogatory No. 25: December 31, 1959.

26. On what periodic basis do the defendants prepare or have prepared financial statements for the Duke City Lumber Company, that is, monthly, quarterly, yearly?

Answer to Interrogatory No. 26: Monthly and yearly.

27. Do the defendants keep or maintain separate accounting books and records of all or any production costs for any or all of the Gallagher Properties?

Answer to Interrogatory No. 27: Defendants have separate records of direct production costs with reference to the Gallagher Properties, all of which, except the payroll record, are integrated within the overall company records.

28. If answer to Interrogatory No. 27 is in the affirmative:

(a) Describe in detail the system or procedure used, including designation of the time periods used therein.

(b) Name or otherwise identify and describe in detail each book of account or category of records used.

(c) State the person having possession of each item described and the present location thereof.

Answer to Interrogatory No. 28:

(a) and (b) The direct production costs are posted on a monthly basis to the general ledger accounts kept within the overall Duke City Lumber Company general ledger and these amounts are in turn recorded on monthly reports entitled "Winslow Operation Summary of Costs," copies of which have been produced in response to Item No. 1 of the Plaintiff's Motion to Produce Documents.

(c) The foregoing items are in the possession of defendants under the supervision of T. S. Cavanaugh, Albuquerque, New Mexico.

31. If defendants keep or maintain separate books of account for the Gallagher Companies, with breakdowns of various production costs, what items of such costs represent sums attributed to the Gallagher Properties out of costs which are prorated among all of the Duke City Lumber Company's operations?

Answer to Interrogatory No. 31: The items of cost attributable to the Gallagher Properties out of costs which are prorated among all of Duke City Lumber Company's operations are not reflected on separate books of account for the Gallagher Properties and the proration is not reflected on any separate accounts within the overall books of account of Duke City Lumber Company. However, in the preparation of the monthly reports, produced in response to Item No. 1 of Plaintiffs' Motion to Produce Documents, there has been an allocation of "Home Office" General and Administrative expense and "Home Office" selling expense.

32. Describe on what basis the defendants allocate the percentage of such costs to the Gallagher Companies.

Answer to Interrogatory No. 32: The allocation in the monthly reports referred to in answer to Interrogatory No. 31 was simply an estimate without any analyses or study of the books. A fair, reasonable and realistic allocation of such items based on footage is contained in the schedule prepared in answer to Interrogatory No. 40.

33. What timber cutting contracts did defendants acquire in the purchase of the Gallagher Properties?

Answer to Interrogatory No. 33: See "Schedule Answering Interrogatory No. 33 and 34."

34. For each of such contracts, state the stumpage-price and the quantity of timber remaining to be cut at the date of such acquisition.

Answer to Interrogatory No. 34: Same as above.

35. Since acquisition of the Gallagher Properties by defendants, what is the total footage of lumber defendants have produced therefrom?

Answer to Interrogatory No. 35: 29,388,428 feet to December 31, 1959.

36. Since acquisition of the Gallagher Properties, what is the total footage of lumber defendants have sold therefrom?

Answer to Interrogatory No. 36: 23,485,199 feet to December 31, 1959.

37. From the time of acquisition of the Gallagher Properties by defendants to date, or to the most recent time for which figures are available, state the following:

(a) The breakdown in board feet by grades of timber produced from the Gallagher Properties, stating specifically the source of this information.

(b) The breakdown in board feet by grades of timber sold from the Gallagher Properties, stating specifically the source of this information.

(c) The average selling price per board foot for each grade.

(d) The total amount in dollars of all sales of lumber for each grade thereof.

Answer to Interrogatory No. 37:

(a) See "Schedule Answering Interrogatory No. 37-A." Source, daily reports prepared by employees at the mill are summarized.

(b) See "Schedule Answering Interrogatory No. 37-B, C and D."

(c) Same as above.

(d) Same as above.

38. What percentage of sales or other transfer of commodities produced from the Gallagher Properties by defendants have been made to corporations all or in part owned by the defendants, and to other partnership operations owned all or in part by the defendants, and to individual enterprises owned all or in part by the defendants.

Answer to Interrogatory No. 38: 22.75%.

39. For all of such sales or transfers referred to in answer to Interrogatory No. 38, give the number of board feet sold, the grade of lumber, the dollar selling price and the total dollar sales.

Answer to Interrogatory No. 39: See "Schedule Answering Interrogatory No. 39."

40. What has been the average profit or loss earned, received or sustained on a board-foot basis from the operation of the Gallagher Properties since their acquisition by the defendants?

Answer to Interrogatory No. 40: \$6.58 as shown by "Schedule Answering Interrogatory No. 40"

hereto attached. [Added in longhand]: Corrected to \$5.79 by Corrected Schedule attached. 5/13/60. J.W.

41. Do defendants have in their possession, custody or control, any books, records or other accounting data relating to the operation of the Gallagher Properties prior to their purchase by defendants? If so:

(a) Describe in detail the system or procedure of accounting used.

(b) Name or otherwise identify, and describe in detail, each book of account or category of records.

Answer to Interrogatory No. 41: Yes.

(a) Defendants have heretofore produced in response to Item No. 2 of Plaintiffs' Motion to Produce Documents copies of all reports and other data in their possession.

(b) Same as above.

42. Is the Western Pine Association Southwest Index for ponderosa pine a reliable guide of the selling prices of commodities which you produce at the Gallagher Properties? If so, for how many years has it been?

Answer to Interrogatory No. 42: Defendants consider the Western Pine Association Southwest Index for ponderosa pine to be a reliable indication in the fluctuations of the market in the lumber industry in general, over a period of years. However, defendants do not have sufficient specific information as to the factors with respect to grades

and whether all products are included in preparing the index to be able to state whether such index is a reliable guide as to the selling prices of commodities which defendants produced and marketed from the Gallagher Properties.

43. If the answer to Interrogatory No. 42 is in the negative, state wherein said Index is not reliable.

Answer to Interrogatory No. 43: See answer to Interrogatory No. 42.

44. State to what amounts, if any, defendants' average sales prices have varied from the aforesaid Index, since acquisition by defendants of the Gallagher Properties.

Answer to Interrogatory No. 44: Defendants are unable to answer Interrogatory No. 44 in the form in which it is submitted. Plaintiffs' attention is directed to the answers to Interrogatory No. 37 and Interrogatory No. 39 in which defendants furnish selling prices.

45. Have defendants prepared or filed any state or federal income tax returns for any periods of time since the acquisition by defendants of the Gallagher Properties? If so, state for what periods of time and with what governmental authorities said returns were filed.

Answer to Interrogatory No. 45: Yes. The partnership of Duke City Lumber Company filed a Federal Income Tax Return with the Internal Rev-

enue Service at Albuquerque, New Mexico, for the fiscal year ending January 31, 1959, and with the New Mexico Bureau of Revenue, Income Tax Division, Santa Fe, New Mexico, for the same period.

The individual defendants filed Federal Income Tax Returns with the Internal Revenue Service at Albuquerque, New Mexico, for the calendar year of 1958, and with the New Mexico Bureau of Revenue, Income Tax Division, Santa Fe, New Mexico, for the same period.

MAURICE LIBERMAN, JOSEPH GREVEY
AND JACK GREVEY, co-partners doing
business as Duke City Lumber Company; and
DUKE CITY LUMBER COMPANY, a part-
nership,

/s/ By MAURICE LIBERMAN.

JENNINGS, STROUSS, SALMON
& TRASK,

/s/ By REX H. MOORE,

/s/ A. J. PFISTER,

Attorneys for Defendants.

State of New Mexico
County of Bernalillo—ss.

Maurice Liberman, being first duly sworn, upon oath states: That he is one of the defendants in this cause and makes this verification for and on behalf of the other defendants herein named; that he has read the above and foregoing answers to interrogatories, knows the contents thereof and that the same are true according to affiant's information and belief.

/s/ MAURICE LIBERMAN.

Subscribed and Sworn to before me this 24th day of February, 1960.

[Seal] /s/ NORA CARRARA,
Notary Public. My Commission Expires December
5, 1962.

Certificate of Mailing Attached.

SCHEDULE ANSWERING INTERROGATORY #6

Duke City Lumber Company

Payments on Note to New Mexico Timber Company
on Purchase of Winslow Plant

From Dec. 15, 1958 to Jan. 31, 1960

	Dr.	Cr.	Balance
12-15-58 To set up note		\$650,000.00	
12-12-58 Payment	\$ 10,833.33		
12-31-58 "	10,833.33		
2-11-59 "	10,833.33		
2-28-59 "	10,833.33		
4- 1-59 "	10,833.33		
4-22-59 "	50,000.00		
4-30-59 "	10,833.33		
5-12-59 "	100,000.00		
5-25-59 "	50,000.00		
5-31-59 "	10,833.33		
6-30-59 "	10,833.33		
7-31-59 "	10,833.33		
8-31-59 "	10,833.33		
9-30-59 "	10,833.33		
10-31-59 "	10,833.33		
11-30-59 "	10,833.33		
11-30-59 "	50,000.00		
12-31-59 "	10,833.33		
1-30-60 "	10,833.33		
	<u>\$412,499.95</u>	<u>\$650,000.00</u>	<u>\$237,500.05</u>

Maurice Liberman, et al. vs.

Schedule Answering Interrogatory #6—(Continued)

Duke City Lumber Company

Payments on Timber Purchased from New Mexico Timber Co., et al.

From Dec. 1, 1958 to Jan. 31, 1960

	Dr.	Cr.	Balance
Amount set up per letter from T. P. Gallagher 2-26-59		\$405,294.37	
12- 1-58 Payment	\$ 10,000.00		
12-30-58 "	10,000.00		
2- 2-59 "	10,000.00		
2-28-59 "	10,000.00		
3-31-59 Payment to adjust to provision of Para 12c of Contract	3,882.36		
3-31-59 Payment	11,294.12		
4-30-59 "	11,294.12		
5-31-59 "	11,294.12		
6-30-59 "	11,294.12		
7-31-59 "	11,294.12		
8-31-59 "	11,294.12		
9-30-59 "	11,294.12		
10-31-59 "	11,294.12		
11-30-59 "	11,294.12		
11-30-59 "	50,000.00		
12-31-59 "	11,294.12		
1-30-60 "	11,294.12		
	\$218,117.68	\$405,294.37	\$187,176.69

Schedule Answering Interrogatory #6—(Continued)

Duke City Lumber Company

Other Payments Made Under Purchase

Contract of November 6, 1958

Nov. 11, 1958—To the United States Forest Service— Timber Deposit—Promontory Sale—	\$ 16,000.00
Dec. 1, 1958—To New Mexico Timber Company— To reimburse for Promontory Road—	7,553.22
Dec. 4, 1958—To New Mexico Timber Company— For their Deposit on Promontory Sale—	15,433.82
Dec. 15, 1958—To Lumberman's Underwriting Alliance and Southwest Insurance Agency— Insurance (fire, etc.)—	30,985.43
Dec. 26, 1958—To Industrial Commission of Arizona— Deposit on Workman's Compensation Insurance—	8,505.00
Mar. 4, 1959—To Nagel Lumber & Timber Company— For one-half of Deposit on Duran Sale—	5,000.00
Apr. 16, 1959—To Leonard Time Company— Deposit on Tire Inventory—	9,509.25
Aug. 31, 1959—To Southwest Lumber Mills— Schultz Cruise—1/2 of New Mexico Timber Company Share—	3,161.28
	<hr/>
	\$ 96,148.00

SCHEDULE ANSWERING INTERROGATORY 17-A

Winslow U & O

Profit:

Sales Average	\$ 88.50—2%	\$	86.73
Costs:			
Woods	21.00		
Sawmill	12.00		
Yard	6.50		
Plm.	5.00		
Ship	1.60		
Depr.	3.90		
	<hr/>		
	\$ 50.00		
Stumpage	16.00		
G & A & Selling	5.10		71.10
	<hr/>		<hr/>
Net Profit Per M		\$	15.63
Production Per 4 Months			8,333 M
			<hr/>
Net Profit		\$	130,245
Continuing Expenses:			
Salaries			
(Weskamp, Steward, Yale Weinstein—75%			
(Cunningham, Foster, Weaver, Simmons,			
(Boyt, Gruner, office \$800.00) + 10%		\$	34,650
Depreciation—carriers and lift trucks, trucks			
and trailers, shop & kilns & sheds			61,350
Interest			15,000
Watchmen (\$800.00 + 10%)			3,520
Power—demand			8,000
Insurance			1,500
			<hr/>
		\$	254,265
			<hr/> <hr/>

Schedule Answering Interrogatory 17-A—(Continued)

May	\$ 18,750
June	18,750
July	18,750
August	\$18,750
September	18,750
October	18,750
November	15,000
December	15,000
January	15,000
February	15,000
March	7,500
April	7,500
	<hr/>
	\$ 187,500
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May 7, 1959

/s/ T. S. CAVANAUGH
T. S. Cavanaugh, Controller

SCHEDULE ANSWERING INTERROGATORY #33 and #34

DUKE CITY LUMBER COMPANY

Stumpage Available for Cutting Under Timber Contracts Acquired
As Of 11-6-58

PROMONTORY UNIT—

Contract Number (12-11-003-504A)

Pine	4,990,000	\$ 15.00	\$ 74,850.00
Pine	4,135,930	12.50	51,699.13
Douglas Fir	1,964,510	4.50	8,840.30
White Fir	3,338,790	1.51	5,041.57
	<hr/>	<hr/>	<hr/>
Total	14,429,230	\$ 9.73	\$140,431.00

DURAN UNIT—

Contract Number (12-11-003-2795A)

Pine	4,052,530	\$ 10.00	\$ 40,522.48
Douglas Fir	257,220	3.00	771.66
White Fir	112,640	4.63	521.16
	<hr/>	<hr/>	<hr/>
Total	4,422,390	\$ 9.46	\$ 41,815.30

AZTEC—

Bernalillo Lumber Company

Pine	14,729,253	\$ 17.00	\$250,397.30
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AZTEC—

Winslow Timber Company

Pine	506,000	\$ 17.00	\$ 8,602.00
	<hr/>	<hr/>	<hr/>
Total	34,086,873	\$ 12.94	\$441,245.60

Winslow - Arizona
Sawmill Production for Period of January 1st

Month	¹ 4/4 Shrp & Btr	² 5/4 Shrp & Btr	³ 6/4 Shrp & Btr	⁴ 3 & Btr Common	⁵ #4 Com.	⁶ #5 Com.	⁷ 4/4 5 & Btr Com	⁸ 5 (18-20)
Jan	225,363	723,945	62,440	715,198	217,509	70,807	208,934	18
Feb	199,950	408,320	216,440	603,995	211,521	75,290	143,311	5
March	133,601	74,840	583,826	581,792	222,522	71,814	136,287	4
April	143,835	-	675,358	725,571	180,264	71,851	242,392	1
May	121,389	290,862	354,270	593,239	332,503	147,654	125,409	7
June	108,346	294,426	513,590	370,995	227,636	63,910	166,194	7
July	117,648	481,124	226,803	350,203	158,855	17,16	313,529	14
August	82,956	-	552,930	-	295,127	8,00	174,192	3
September	77,140	-	518,303	-	543,883	295,091	-	3
October	59,641	-	402,530	-	234,042	222,712	38,755	2
November	133,441	17,16	488,370	1,680	409,845	478,584	-	2
December	131,840	-	653,650	24,568	549,646	534,087	-	2
24	1,535,150	2,275,233	5,248,510	3,967,241	3,583,353	2,034,316	1,549,003	6
25								
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Schedule answering Interrogatory 37-A



LUMBER SHIPPED FROM WINSLOW

Feb. 1, 1959 to December 31, 1959

	YEAR TO DATE			Per M
	%	Feet	Amount	
C & BETTER SELECT	4/4	22,338	5,950.30	266.38
C & BETTER SELECT	6/4	6,412	1,700.49	265.20
TOTAL		28,750	7,650.79	266.11
D SELECTS	4/4	84,038	16,498.70	196.32
D SELECTS	5/4	64,915	11,649.73	179.46
D SELECTS	6/4	179,153	30,791.91	171.87
TOTAL		328,106	58,940.34	179.64
D & BETTER SELECTS	4/4	28,202	5,262.49	186.60
D & BETTER SELECTS	6/4	2,050	535.89	261.41
TOTAL		30,252	5,798.38	191.67
M G	4/4	53,220	8,272.56	155.44
TOTAL		53,220	8,272.56	155.44
SHOP COMMON	4/4	489,278	44,925.65	91.00
THIRD CLEARS	4/4	85,916	9,727.87	113.23
THIRD CLEARS	5/4	6,171	1,049.58	170.08
THIRD CLEARS	6/4	9,860	1,746.62	177.14
TOTAL		80	16.16	202.00
		102,107	12,556.39	122.97
TOTAL		.62		

	YEAR TO DATE		
	%	Feet	Amount
# 1 SHOP			Per M
5/4	.39	64,411	8,795.00
6/4	.68	111,182	15,560.22
TOTAL	1.07	175,593	24,355.22
# 2 SHOP			
5/4	2.41	393,995	42,637.13
6/4	5.02	821,866	91,424.69
TOTAL	7.43	1,215,861	134,061.82
# 3 SHOP			
5/4	.31	50,780	3,948.32
6/4	1.02	167,603	16,661.73
TOTAL	1.33	218,383	17,610.05
COMMONS			
# 2 & BETTER COMMON			
4/4	1.59	260,609	30,164.61
6/4	.01	2,269	246.35
TOTAL	1.61	262,878	30,410.96
# 3 COMMON			
4/4	20.92	3,421,725	273,131.43
5/4	1.82	298,377	24,302.36
6/4	5.64	922,657	78,683.01
TOTAL	28.38	4,642,729	376,116.80
# 4 COMMON			
4/4	22.79	3,728,066	244,501.24
5/4	1.28	209,566	13,875.57
6/4	6.75	1,104,648	82,804.88
TOTAL	30.82	5,042,280	341,181.69

YEAR TO DATE

	%	Feet	Amount	Per M
#5 COMMON	6.06	992,089	39,352.64	39.67
#5 COMMON	.13	21,249	848.35	39.92
#5 COMMON	1.70	277,996	12,554.54	45.16
TOTAL	7.89	1,291,334	52,755.53	40.85
#2 & BTR COM W/PTRN	.96	156,996	16,122.12	102.69
#2 & BTR COM W/PTRN	.03	5,551	616.90	111.13
TOTAL	.99	162,547	16,739.02	102.98
#3 COMMON W/PATTERN	.42	68,979	5,744.57	83.28
#3 COMMON W/PATTERN	.18	29,402	2,797.17	95.14
TOTAL	.60	98,381	8,541.74	86.82
#4 COMMON W/PATTERN	.08	13,503	972.61	72.03
TOTAL	.08	13,503	972.61	72.03
#2 & BTR DIMENSION	3.22	526,392	42,067.41	79.92
#2 & BTR W/15% H3 DIM.	.17	27,457	2,226.20	81.08
#3 DIMENSION	.21	33,623	2,061.61	61.32
#4 DIMENSION	.27	44,224	1,261.20	28.52
TOTAL PINE	90.52	14,809,641	1,189,934.89	80.35
DOUGLAS FIR				
#2 & BTR DIMENSION	2.29	375,092	30,583.34	81.54
#2 & BTR DIMENSION	.12	20,112	1,650.67	82.07
#3 MIMENSION	.46	75,410	4,947.84	65.61
#4 DIMENSION	.30	49,355	1,548.18	31.37
TOTAL DOUGLAS FIR	3.00	490,126	37,327.37	76.16

	YEAR TO DATE		Per M
	%	Amount	
ENGLEMAN SPRUCE			
WHITE FIR			
# 2 & BTR DIMENSION	8/4	464,101	80.67
# 2 & BTR DIM. W/15%	38/4	104,655	79.04
# 3 DIMENSION	8/4	117,866	68.27
# 4 DIMENSION	8/4	132,949	36.10
TOTAL WHITE FIR		319,571	71.45
MIXED SPECIES			
# 3 COMMON	4/4	140,871	65.39
TOTAL		140,871	65.39
# 2 DIMENSION	8/4	33,109	69.96
# 3 DIMENSION	8/4	10,973	70.00
# 4 DIMENSION	8/4	48,501	31.53
TOTAL MIXED SPECIES		209,091	62.38
TOTAL OF ALL LUMBER		16,359,812	79.41
		1,299,203.35	

Schedule answering Interrogatory 39

DUKE CITY LUMBER CO.

TRANSFER FROM WINSLOW TO ALBUQUERQUE

From Acquisition to Dec. 31, 1959

	Feet	Per M	Amount
Mld. 4/4	168,401	\$149.92	\$ 25,246
Mldg. & Btr. 5/4 & Thk.	1,433,308	193.99	278,041
Shop 4/4	48,245	72.42	3,494
Shop 3 5/4 & Thk.	1,414,977	76.30	107,969
Cut Type Commons	543,200	44.36	24,099
#2 & Btr. Commons	107,399	110.91	11,912
#3 Commons	480,884	80.42	38,674
3 & Btr. Commons	104,671	80.79	8,456
#4 Commons	565,770	66.69	37,734
#5 Commons	476,170	41.31	19,671
Total	5,343,025	\$103.93	\$555,296

Schedule answering Interrogatory #40

DUKE CITY LUMBER CO.

PROFIT PER M—WINSLOW OPERATION

From Acquisition to December 31, 1959

	Per M
Sales and Transfers (sched. A)	\$ 86.54
COSTS:	
Production Costs (sched. B)	\$ 55.56
Stumpage & Brush (sched. C)	13.01
General & Administrative (sched. D)	5.34
Selling (sched. E)	2.14
Interest (sched. F)	4.01
Total Costs	\$ 80.06
	6.48
Gain on Sale of Assets (sched. G)	.10
Profit Per M	\$ 6.58

SCHEDULE A

DUKE CITY LUMBER CO.

SALES AND TRANSFERS FROM WINSLOW

From Acquisition to December 31, 1959

To Customers	15,243,547	\$1,214,243.97	\$ 79.66
To Albuquerque	5,343,025	555,296.00	103.93
Fire Loss	2,898,627	304,369.00	105.00
Total	23,485,199	\$2,073,908.97	\$ 88.31
Less Cash Discounts			1.77
			\$ 86.54

SCHEDULE B

DUKE CITY LUMBER CO.

SUMMARY — PRODUCTION COSTS — WINSLOW

From December 1, 1958 to December 31, 1959

		Per M
Falling, Skidding, Loading (P. Ramsey)	\$11.23	
Log Hauling	9.87	
Sub-total	\$21.10	
Contract Logging (H. Ramsey)	\$21.10	
Average	\$21.10	
Main Road Construction	.72	
Road Maintenance	.03	
Unload and Deck	.29	
Total Woods to Pond		\$22.14
Pond	\$.82	
Sawmill	8.02	
Green Chain	1.40	
Total Pond To Green Chain		\$10.24

SCHEDULE "B"—(Continued)

Stacking (pro-rated on sawmill footage)	\$ 2.56	
Drying Yard (pro-rated on sawmill footage)	.73	
Dry Sorting Chain (pro-rated on planer footage)	.09	
Dry Kiln (pro-rated on planer footage)	2.75	
Service Department	5.41	
	<hr/>	
Total Yarding & Service		\$11.54
Planing Mill		7.18
Surface Yard—Shipping		1.80
General & Administrative at Plant		2.66
		<hr/>
Total		\$55.56

DUKE CITY LUMBER CO.

PRODUCTION COSTS—WINSLOW

From December 1, 1958 to December 31, 1959

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
FALLING, SKIDDING & LOADING:			
Contract	26,602,920	\$ 294,664	\$ 11.08
Scaling Labor	"	2,382	.09
Scaling Overhead	"	167	.01
Supplies & Expense	"	26	-0-
Comp	"	1,438	.05
	<hr/>	<hr/>	<hr/>
	"	\$ 298,677	\$ 11.23
LOG HAULING:			
Supervision	19,778,537	\$ 1,824	\$.09
Labor	"	49,609	2.51
Overhead	"	3,563	.20
Supplies & Expense	"	42,919	2.16
Tires	"	31,289	1.58
Fuel	"	11,116	.56
Depreciation	"	51,865	2.62
	<hr/>	<hr/>	<hr/>
	"	\$ 192,185	\$ 9.72
CONTRACT:	6,540,188	67,796	10.37
	<hr/>	<hr/>	<hr/>
	26,318,725	\$ 259,981	\$ 9.87

SCHEDULE "B"—(Continued)

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
CONTRACT LOGGING: 3,445,983		72,720	21.10
MAIN ROAD			
CONSTRUCTION: 29,764,708		21,570	.72
ROAD MAINTENANCE			
Supplies & Expense 29,764,708		828	.03
UNLOAD & DECK:			
Labor "		4,369	.15
Overhead "		442	.01
Supplies & Expense "		3,956	.13
	"	\$ 8,767	\$.29
POND:			
Labor 29,388,428		\$ 21,205	\$.73
Overhead "		1,590	.05
Supplies & Expense "		1,215	.04
	"	\$ 24,010	\$.82
SAWMILL:			
Supervision 29,388,428		\$ 11,577	\$.39
Labor "		90,087	3.07
Maintenance Labor "		19,982	.68
Overhead "		10,752	.37
Supplies & Expense "		33,134	1.13
Utilities "		23,117	.79
Saws "		4,307	.15
Depreciation "		42,620	1.44
	"	\$ 235,576	\$ 8.02
GREEN CHAIN:			
Labor "		\$ 37,542	\$ 1.28
Overhead "		2,841	.10
Supplies & Expense "		891	.02
	"	\$ 41,274	\$ 1.40
STACKING:			
Supervision 27,698,878		\$ 2,003	\$.07
Labor "		45,954	1.66
Overhead "		3,063	.12
Supplies & Expense "		9,395	.34
Depreciation "		12,237	.44
Stacking Sticks "		2,595	.09
	"	\$ 75,247	\$ 2.72

SCHEDULE "B"—(Continued)

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
DRYING YARD:			
Supervision	30,674,158	\$ 1,663	\$.05
Labor	"	5,346	.17
Overhead	"	506	.02
Supplies & Expense	"	1,797	.06
Depreciation	"	12,238	.40
	<hr/>	<hr/>	<hr/>
	"	\$ 21,550	\$.70
DRY SORTING CHAIN:			
Supervision			
Labor	9,889,000	\$ 17,575	\$.18
Overhead	"	1,490	.02
Supplies & Expense	"	453	-0-
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	"	\$ 19,518	\$.20
DRY KILN			
Supervision	7,645,720	\$ 2,003	\$.26
Labor	"	15,649	2.05
Overhead	"	409	.05
Supplies & Expense	"	8,836	1.16
Electricity	"	11,176	1.46
Gas	"	9,460	1.24
Depreciation	"	13,529	1.77
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	"	\$ 61,062	\$ 7.99
PLANING MILL:			
Supervision	22,173,000	\$ 9,471	\$.43
Labor	"	61,607	2.78
Maintenance Labor	"	7,304	.33
Overhead	"	6,917	.31
Supplies & Expense	"	34,189	1.54
Utilities	"	11,061	.50
Saws	"	924	.04
Knives	"	1,297	.06
Depreciation	"	26,488	1.19
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	"	\$ 159,258	\$ 7.18

SCHEDULE "B"—(Continued)

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
SURFACE YARD—SHIPPING:			
Supervision	22,292,309	\$ 3,325	\$.15
Labor	"	22,563	1.01
Overhead	"	2,189	.10
Supplies & Expense	"	1,682	.08
Strapping	"	6,500	.29
Depreciation	"	3,828	.17
Shipping	"	18	-0-
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	"	\$ 40,105	\$ 1.80
SERVICE DEPARTMENT:			
Supervision	29,388,428	\$ 1,300	\$.04
Labor	"	42,018	1.43
Overhead	"	3,716	.13
Supplies & Expense	"	28,217	.96
Oil & Gas	"	8,951	.30
Depreciation	"	32,117	1.09
Yard Maintenance	"	2,018	.07
Plant Protection	"	7,295	.25
Insurance	"	33,573	1.14
	<hr/>	<hr/>	<hr/>
	"	\$ 159,205	\$ 5.41
GENERAL & ADMINISTRATIVE AT PLANT:			
Salaries	22,292,309	\$ 33,823	\$ 1.51
Overhead	"	966	.04
Office Expense	"	1,982	.09
Tel & Tel	"	2,486	.11
Depreciation	"	3,063	.14
Contributions	"	586	.03
Dues & Subscriptions	"	104	.01
Group Insurance	"	2,629	.12
Auto & Travel	"	1,647	.07
Legal & Audit	"	1,308	.06
Property Tax	"	1,140	.05
Miscellaneous	"	6,797	.31
Licenses	"	2,721	.12
	<hr/>	<hr/>	<hr/>
	"	\$ 59,252	\$ 2.66

DUKE CITY LUMBER CO.

COST OF STUMPAGE & BRUSH—WINSLOW
December 1, 1958 to December 31, 1959

	Feet	STUMPAGE Per M	Cost	Brush
Sections cut from:				
Aztec (Bernalillo Lumber Co. contract)				
Pine	9,632,059	\$17.00	\$163,745.00	
Pine (semi-accessible)	75,000	17.16	1,287.00	
Douglas Fir	4,000	6.05	24.20	
	<u>9,711,059</u>	<u>\$17.00</u>	<u>\$165,056.20</u>	
Aztec (Duke City Lumber Co. Contract)				
Pine	1,134,300	\$19.00	\$ 21,551.70	
Promontory (U. S. Forest Service Contract)				
Pine	8,960,800	\$13.85	\$124,072.18	
Douglas Fir	711,880	4.50	3,203.44	
White Fir	1,230,320	2.24	2,767.83	
	<u>10,903,000</u>	<u>\$11.93</u>	<u>\$130,043.45</u>	<u>\$16,899.65</u>
Duran (U. S. Forest Service Contract)				
Pine	4,052,530	\$10.00	\$ 40,522.48	
Douglas	257,220	3.00	771.66	
White Fir	112,640	4.63	521.16	
	<u>4,422,390</u>	<u>\$ 9.46</u>	<u>\$ 41,815.30</u>	<u>\$14,593.89</u>

SCHEDULE "C"—(Continued)

	Feet	STUMPAGE Per M	Cost	Brush
Right of Way Unit (U. S. Forest Service) Pine	37,950	\$15.45	\$ 586.33	
Right of Way Timber (U. S. Forest Service) Pine	17,080	\$14.05	\$ 239.97	
TOTAL	<u>26,225,779</u>	<u>\$13.70</u>	<u>\$359,292.95</u>	<u>\$31,493.54</u>
Stumpage Brush			<u>\$359,292.95</u>	
Total Stumpage & Brush			<u>\$390,786.49</u>	
Total Stumpage & Brush (Per M)			\$ 14.90	
Total Stumpage & Brush Converted by Over-run: Contract Felling			26,602,920 ft.	
Contract Logging (including felling)			3,445,983 ft.	
Total Felling			<u>30,048,903 ft.</u>	
Total Cost as Above			<u>\$390,786.49</u>	
Average Cost Per M			<u>\$ 13.01</u>	

SCHEDULE D

DUKE CITY LUMBER CO.

GENERAL & ADMINISTRATIVE EXPENSE

From Feb. 1, 1959 to Dec. 31, 1959

	Amount
Partners & Officers Salaries	\$ 87,007
Office Salaries & Supervision	60,717
Bonuses	44,740
Travel	14,568
Auto Expense & Depreciation	8,769
Office Supplies & Expense	8,229
Dues & Subscriptions	12,866
Contributions	13,908
Legal	17,242
Audit	13,425
Professional Services	913
General Liability Insurance	5,663
Group Insurance	4,182
Occupation Taxes & Licenses	7,040
Property Taxes	959
Payment to Former Partner	9,163
Miscellaneous	4,016
Cash Discounts Earned	(9,490)
	<hr/>
Total	\$ 303,917
Total Shipments During The Above Period	56,944,957
Average Per M	\$ 5.34

SCHEDULE E

DUKE CITY LUMBER CO., SELLING EXPENSE

From Feb. 1, 1959 to Dec. 31, 1959

	Amount
Salaries	\$ 55,499
Travel	16,349
Auto Expense	2,142
Office Supplies & Expense	4,907
Postage	1,617
Advertising	1,858
Telephone & Telegraph	24,736
Credit & Collection	5,145
Sales Tax	9,535
Total	<u>\$ 121,788</u>
Total Shipments During The Above Period:	56,944,957 ft.
Average Per M	\$ 2.14

SCHEDULE F

DUKE CITY LUMBER CO.

INTEREST EXPENSE—WINSLOW

From Dec. 1, 1958 to Dec. 31, 1959

1. Interest on \$650,000 purchase price at 6%— 13 months	\$ 42,250.00
2. Interest paid on timber contract to New Mexico timber	19,378.22
3. Interest on \$500,000 of working capital used for inventories, receivables, prepaid items, de- posits etc., at 6%—13 months	32,500.00
Total	<u>\$ 94,128.22</u>
Cost per thousand board foot of lumber shipped (23,485,199 ft.)	\$ 4.01

SCHEDULE G

DUKE CITY LUMBER CO.

GAIN ON SALE OF ASSETS—WINSLOW

From Acquisition to December 31, 1959

Gain on Sale of Gerlinger Lift Truck	\$ 2,447.00
Gain per Thousand board feet of lumber shipped (23,485,199 ft.)	.10

SCHEDULE ANSWERING INTERROGATORY #40
(Corrected)

Profit Per M—Winslow Operation

From Acquisition to December 31, 1959

	Per M
Sales and Transfers (sched. A)	\$ 86.54
Costs:	
Production Costs (sched. B)	\$ 56.35
Stumpage & Brush (sched. C)	13.01
General & Administrative (sched. D)	5.34
Selling (sched. E)	2.14
Interest (sched. F)	4.01
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Total Costs	\$ 80.85
	5.69
Gain on Sale of Assets (sched. G)	.10
	<hr/>
Profit Per M	\$ 5.79

Maurice Liberman, et al. vs.
Schedule Answering Interrogatory #40—(Continued)

Schedule A

Duke City Lumber Co.

Sales and Transfers From Winslow

From Acquisition to December 31, 1959

To Customers	15,243,547	\$ 1,214,243.97	\$ 79.66
To Albuquerque	5,343,025	555,296.00	103.93
Fire Loss	2,898,627	304,369.00	105.00
Total	23,485,199	\$ 2,073,908.97	\$ 88.31
Less Cash Discounts			1.77
			\$ 86.54

Schedule B

Duke City Lumber Co.

Summary—Production Costs—Winslow

From December 1, 1958 to December 31, 1959

		Per M
Falling, Skidding, Loading (P. Ramsey)	\$ 11.23	
Log Hauling	9.87	
Sub-total	\$ 21.10	
Contract Logging (H. Ramsey)	\$ 21.10	
Average	\$ 21.10	
Main Road Construction	.72	
Road Maintenance	.03	
Unload and Deck	.29	
Total Woods to Pond		\$ 22.14
Pond	\$.82	
Sawmill	8.02	
Green Chain	1.40	
Total Pond to Green Chain		\$ 10.24

SCHEDULE "B"—(Continued)
 Schedule Answering Interrogatory #40—(Continued)

	Per M
Stacking (pro-rated on sawmill footage)	\$ 2.56
Drying Yard (pro-rated on sawmill footage)	.73
Dry Sorting Chain (pro-rated on planer footage)	.88
Dry Kiln (pro-rated on planer footage)	2.75
Service Department	5.41
Total Yarding & Service	\$ 12.33
Planing Mill	7.18
Surface Yard—Shipping	1.80
General & Administrative at Plant	2.66
Total	\$56.35

DUKE CITY LUMBER CO.
 PRODUCTION COSTS—WINSLOW
 From December 1, 1958 to December 31, 1959

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
FALLING, SKIDDING & LOADING:			
Contract	26,602,920	\$ 294,664	\$ 11.08
Scaling Labor	"	2,382	.09
Scaling Overhead	"	167	.01
Supplies & Expense	"	26	-0-
Comp	"	1,438	.05
	"	<u>\$ 298,677</u>	<u>\$ 11.23</u>
LOG HAULING:			
Supervision	19,778,537	\$ 1,824	\$.09
Labor	"	49,609	2.51
Overhead	"	3,563	.20
Supplies & Expense	"	42,919	2.16
Tires	"	31,289	1.58
Fuel	"	11,116	.56
Depreciation	"	51,865	2.62
	"	<u>\$ 192,185</u>	<u>\$ 9.72</u>
CONTRACT:	6,540,188	67,796	10.37
	<u>26,318,725</u>	<u>\$ 259,981</u>	<u>\$ 9.87</u>

SCHEDULE "B"—(Continued)

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
CONTRACT LOGGING: 3,445,983		72,720	21.10
MAIN ROAD			
CONSTRUCTION: 29,764,708		21,570	.72
ROAD MAINTENANCE			
Supplies & Expense 29,764,708		828	.03
UNLOAD & DECK:			
Labor	"	4,369	.15
Overhead	"	442	.01
Supplies & Expense	"	3,956	.13
	"	<u>\$ 8,767</u>	<u>\$.29</u>
POND:			
Labor 29,388,428		\$ 21,205	\$.73
Overhead	"	1,590	.05
Supplies & Expense	"	1,215	.04
	"	<u>\$ 24,010</u>	<u>\$.82</u>
SAWMILL:			
Supervision 29,388,428		\$ 11,577	\$.39
Labor	"	90,087	3.07
Maintenance Labor	"	19,982	.68
Overhead	"	10,752	.37
Supplies & Expense	"	33,134	1.13
Utilities	"	23,117	.79
Saws	"	4,307	.15
Depreciation	"	42,620	1.44
	"	<u>\$ 235,576</u>	<u>\$ 8.02</u>
GREEN CHAIN:			
Labor	"	\$ 37,542	\$ 1.28
Overhead	"	2,841	.10
Supplies & Expense	"	891	.02
	"	<u>\$ 41,274</u>	<u>\$ 1.40</u>
STACKING:			
Supervision 27,698,878		\$ 2,003	\$.07
Labor	"	45,954	1.66
Overhead	"	3,063	.12
Supplies & Expense	"	9,395	.34
Depreciation	"	12,237	.44
Stacking Sticks	"	2,595	.09
	"	<u>\$ 75,247</u>	<u>\$ 2.72</u>

SCHEDULE "B"—(Continued)

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
DRYING YARD:			
Supervision	30,674,158	\$ 1,663	\$.05
Labor	"	5,346	.17
Overhead	"	506	.02
Supplies & Expense	"	1,797	.06
Depreciation	"	12,238	.40
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	"	\$ 21,550	\$.70
DRY SORTING CHAIN:			
Supervision			
Labor	9,889,000	\$ 17,575	\$ 1.78
Overhead	"	1,490	.15
Supplies & Expense	"	453	.04
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	"	\$ 19,518	\$ 1.97
DRY KILN			
Supervision	7,645,720	\$ 2,003	\$.26
Labor	"	15,649	2.05
Overhead	"	409	.05
Supplies & Expense	"	8,836	1.16
Electricity	"	11,176	1.46
Gas	"	9,460	1.24
Depreciation	"	13,529	1.77
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	"	\$ 61,062	\$ 7.99
PLANING MILL:			
Supervision	22,173,000	\$ 9,471	\$.43
Labor	"	61,607	2.78
Maintenance Labor	"	7,304	.33
Overhead	"	6,917	.31
Supplies & Expense	"	34,189	1.54
Utilities	"	11,061	.50
Saws	"	924	.04
Knives	"	1,297	.06
Depreciation	"	26,488	1.19
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	"	\$ 159,258	\$ 7.18

SCHEDULE "B"—(Continued)

	<u>Feet</u>	<u>Amount</u>	<u>Per M</u>
SURFACE YARD—SHIPPING:			
Supervision	22,292,309	\$ 3,325	\$.15
Labor	"	22,563	1.01
Overhead	"	2,189	.10
Supplies & Expense	"	1,682	.08
Strapping	"	6,500	.29
Depreciation	"	3,828	.17
Shipping	"	18	-0-
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	"	\$ 40,105	\$ 1.80
SERVICE DEPARTMENT:			
Supervision	29,388,428	\$ 1,300	\$.04
Labor	"	42,018	1.43
Overhead	"	3,716	.13
Supplies & Expense	"	28,217	.96
Oil & Gas	"	8,951	.30
Depreciation	"	32,117	1.09
Yard Maintenance	"	2,018	.07
Plant Protection	"	7,295	.25
Insurance	"	33,573	1.14
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	"	\$ 159,205	\$ 5.41
GENERAL & ADMINISTRATIVE AT PLANT:			
Salaries	22,292,309	\$ 33,823	\$ 1.51
Overhead	"	966	.04
Office Expense	"	1,982	.09
Tel & Tel	"	2,486	.11
Depreciation	"	3,063	.14
Contributions	"	586	.03
Dues & Subscriptions	"	104	.01
Group Insurance	"	2,629	.12
Auto & Travel	"	1,647	.07
Legal & Audit	"	1,308	.06
Property Tax	"	1,140	.05
Miscellaneous	"	6,797	.31
Licenses	"	2,721	.12
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	"	\$ 59,252	\$ 2.66

DUKE CITY LUMBER CO.

COST OF STUMPAGE & BRUSH—WINSLOW
December 1, 1958 to December 31, 1959

	Feet	STUMPAGE Per M	Cost	Brush
Sections cut from:				
Aztec (Bernalillo Lumber Co. contract)				
Pine	9,632,059	\$17.00	\$163,745.00	
Pine (semi-accessible)	75,000	17.16	1,287.00	
Douglas Fir	4,000	6.05	24.20	
	<u>9,711,059</u>	<u>\$17.00</u>	<u>\$165,056.20</u>	
Aztec (Duke City Lumber Co. Contract)				
Pine	1,134,300	\$19.00	\$ 21,551.70	
Promontory (U. S. Forest Service Contract)				
Pine	8,960,800	\$13.85	\$124,072.18	
Douglas Fir	711,880	4.50	3,203.44	
White Fir	1,230,320	2.24	2,767.83	
	<u>10,903,000</u>	<u>\$11.93</u>	<u>\$130,043.45</u>	<u>\$16,899.65</u>
Duran (U. S. Forest Service Contract)				
Pine	4,052,530	\$10.00	\$ 40,522.48	
Douglas	257,220	3.00	771.66	
White Fir	112,640	4.63	521.16	
	<u>4,422,390</u>	<u>\$ 9.46</u>	<u>\$ 41,815.30</u>	<u>\$14,593.89</u>

SCHEDULE "C"—(Continued)

	Feet	STUMPAGE Per M	Cost	Brush
Right of Way Unit (U. S. Forest Service) Pine	37,950	\$ 15.45	\$ 586.33	
Right of Way Timber (U. S. Forest Service) Pine	17,080	\$ 14.05	\$ 239.97	
TOTAL	<u>26,225,779</u>	<u>\$ 13.70</u>	<u>\$ 359,292.95</u>	<u>\$ 31,493.54</u>
Stumpage Brush			<u>\$ 359,292.95</u>	
Total Stumpage & Brush			<u>\$ 390,786.49</u>	
Total Stumpage & Brush (Per M)			\$ 390,786.49	
			<u>26,225,778 ft.</u>	
Total Stumpage & Brush Converted by Over-run: Contract Felling			\$ 14.90	
Contract Logging (including felling)			26,602,920 ft.	
Total Felling			3,445,983 ft.	
Total Cost as Above			<u>30,048,903 ft.</u>	
Average Cost Per M			<u>\$ 390,786.49</u>	
			<u>\$ 13.01</u>	

SCHEDULE D

DUKE CITY LUMBER CO.

GENERAL & ADMINISTRATIVE EXPENSE

From Feb. 1, 1959 to Dec. 31, 1959

	Amount
Partners & Officers Salaries	\$ 87,007
Office Salaries & Supervision	60,717
Bonuses	44,740
Travel	14,568
Auto Expense & Depreciation	8,769
Office Supplies & Expense	8,229
Dues & Subscriptions	12,866
Contributions	13,908
Legal	17,242
Audit	13,425
Professional Services	913
General Liability Insurance	5,663
Group Insurance	4,182
Occupation Taxes & Licenses	7,040
Property Taxes	959
Payment to Former Partner	9,163
Miscellaneous	4,016
Cash Discounts Earned	(9,490)
Total	<hr/> \$ 303,917
Total Shipments During The Above Period	56,944,957
Average Per M	\$ 5.34

SCHEDULE E

DUKE CITY LUMBER CO., SELLING EXPENSE

From Feb. 1, 1959 to Dec. 31, 1959

	Amount
Salaries	\$ 55,499
Travel	16,349
Auto Expense	2,142
Office Supplies & Expense	4,907
Postage	1,617
Advertising	1,858
Telephone & Telegraph	24,736
Credit & Collection	5,145
Sales Tax	9,535
Total	<u>\$ 121,788</u>
Total Shipments During The Above Period:	56,944,957 ft.
Average Per M	\$ 2.14

SCHEDULE F

DUKE CITY LUMBER CO.

INTEREST EXPENSE—WINSLOW

From Dec. 1, 1958 to Dec. 31, 1959

1. Interest on \$650,000 purchase price at 6%— 13 months	\$ 42,250.00
2. Interest paid on timber contract to New Mexico timber	19,378.22
3. Interest on \$500,000 of working capital used for inventories, receivables, prepaid items, de- posits etc., at 6%—13 months	32,500.00
Total	<u>\$ 94,128.22</u>
Cost per thousand board foot of lumber shipped (23,485,199 ft.)	\$ 4.01

DUKE CITY LUMBER CO.

GAIN ON SALE OF ASSETS—WINSLOW

From Acquisition to December 31, 1959

Gain on Sale of Gerlinger Lift Truck	\$ 2,447.00
Gain per Thousand board feet of lumber shipped - (23,485,199 ft.)	.10

[Endorsed]: Filed February 25, 1960.

[Title of District Court and Cause.]

DECISION

December 30, 1960

The Court finds the issues in this cause in favor of plaintiffs and against defendants and finds plaintiffs' damages in the sum of \$367,615.00.

Counsel for plaintiffs will prepare, serve, and lodge with the Court proposed findings of fact and conclusions of law as provided by the local rules of court.

[Endorsed]: Filed December 30, 1960.

[Title of District Court and Cause.]

FINDINGS OF THE COURT

The Above Entitled Matter came up for hearing on the 12th day of June, 1961, at Tucson, Arizona, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to-wit:

(Proceedings preceding and following the Court's Findings are embodied in a separate transcript and to be attached hereto.)

The Court: The Court found from the evidence that if the parties had gone ahead, pursuant to the agreement there would have been available to them for producing and marketing of what is described in some of the exhibits as the Duke City-Aztec, 50,663,000 feet, there would have been a net recovery of that amount of lumber from the Duke City-Aztec, on which the parties would have derived a profit of \$3 per thousand, which would have given to the parties a joint profit of \$151,989, of which one-half or \$75,994.50 would have been the share of the plaintiffs. The Court further found that from what has been described in the exhibits as the Gallagher-Aztec and Forest Service Timber there would have been a net recovery to the parties of 194,685,000 feet, as to which there could be reasonably anticipated a profit of \$4.71 per thousand, which would produce a joint profit to the parties of \$916,966.35. And the share of the plaintiffs would have been half of that, or \$458,483.18.

In this last figure I want to make it plain that the Court does not include the some 21,000,000 feet of lumber which the plaintiffs claim was owed by Duke City. I disregarded that. I think it is erroneously included in the plaintiffs' claim and in their calculation. So that is out.

Mr. Enersen: Could I have that figure again?

The Court: It is roughly 21,000,000 feet. It is claimed that was owed by Duke City to the Galaghers, as you might style them, and that that would have been processed. I find that the plaintiffs' claim in that regard is wrong.

So that for the plaintiffs' share of the prospective profits I arrived at the figure \$534,477.68. Then I allotted that income to the years in which it would be received and calculated the present value on a 4 per cent interest basis, using the tables that are in evidence. They come from page 129 of the 1939 Code, Volume 6. I used those tables that were received in evidence, and thereby reduced the \$534,000 to a present value figure of \$416,363.46. I deducted from that interest which the plaintiffs would have been required to pay on the purchase price, of some \$48,750, and arrived at then a net figure for damages of \$367,613.46, which was rounded to the amount \$367,615.

And that is the basis upon which the Court arrived at the damages awarded.

Mr. Enersen: Might I inquire, your Honor, the amount of the investment used in calculating that last figure?

The Court: You mean the 48,000—

Mr. Enersen: Yes.

The Court: It is the interest on the installment payments, as I recall, there was so much down and it was payable in terms. And it was whatever that agreement of sale between the defendants and the Gallagher interests, that was the way it was arrived at, computing the interest on that contract.

Mr. Enersen: At the same rate?

The Court: The same rate.

Mr. Enersen: May I also ask your Honor how many years of operation were included in this forecast?

The Court: I used the figures, as I recall, from Exhibit Number 9, Plaintiff's Exhibit Number 9. It was the years 1959 through 1973. They are on 9 or perhaps it is 13. But it is 1959 through 1973.

Mr. Enersen: I thank you for those figures. We have been pushing pencils and had gotten close.

The Court: Perhaps I should have advised counsel when I went over the objections the first time that I would do that on the hearing so that you wouldn't have been trying to psychoanalyze me, trying to figure out the method, because I do think your request for finding on that is proper and the Court should indicate just how it is arrived at.

Mr. Enerson: I take it then, your Honor, this award is not made upon the basis of the customary rule for damages for breach of contract to sell real estate?

The Court: No. No, it is based on the proposition that there was an agreement, breach of an agreement to engage in a business, as to which profit could be anticipated with a reasonable certainty and the amount of the recovery would be the profits which could with reasonable certainty be anticipated to result had the contract not been breached, but had the parties performed.

(The following statements by Mr. Enersen to be found in the separate transcript.)

The Court: I am going to ask counsel for the plaintiffs to prepare new findings, final draft, and of course as to finding number 12 I will anticipate or expect you will reproduce Exhibit 3 in haec verba.

On finding number 7, in line 3, page 3 line 3, following the word "enterprise," to insert the words: "Together with certain physical assets, easements, leases and timber contracts appurtenant thereto,—" it goes on, "hereafter will be referred to," et cetera.

Mr. Romley: Could I have those words again, your Honor?

The Court: "—together with certain physical assets, easements, leases and timber contracts appurtenant thereto,—"

In line 4, page 3, the first line of finding number 8. Strike the word "properties," and insert "business operations." "Gallagher business operations," instead of "properties."

Mr. Romley: So it will read, "Gallagher business operations and the plaintiffs' business operations."

The Court: That is right. I think to make more clear my basis for finding a contract and agreement there should be an additional finding, which would follow 12 as 12-A, and it would read: "That from the conversations and negotiations of the parties carried on at the meeting of September 20, 1958, and from the language of Exhibit 3 in evidence, the plaintiffs understood at the time Exhibit 3 was executed by the parties, and the defendants then knew or had reason to know, that the plaintiffs understood from such conversations and negotiations and from the language of Exhibit 3, that plaintiffs and defendants had contracted and agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher properties; that defendants would then proceed to negotiate a purchase thereof; that in the event the defendants purchased the Gallagher properties, then plaintiffs would have an option until April 30, 1959, to purchase from defendants an undivided one-half interest in said Gallagher properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher companies, payable in the manner provided for in Defendants' agreement of purchase. That in the event plaintiffs exercised their said option, the plaintiffs and defendants, in addition to operating the business would share equally the ob-

ligation to provide any capital necessary therefor, as well as sharing equally the profits and losses of the business; and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly acquired mill, under the terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5."

In finding number 13, at the first line of the finding, line 22, page 4, strike the words "aforesaid agreement between," and insert, "execution of Exhibit 3 by," so it reads: "At the time of execution of Exhibit 3 by plaintiffs and defendants."

Finding number 14 in line 28 on page 4, strike out: "as required by the aforesaid agreement."

The proposed findings, skip from the release by the plaintiffs of the right of first refusal to the execution of the preliminary agreement, or agreement of November 6 between the defendants and the Gallagher companies. I think the findings ought to describe the business of the telephone conversations from New York while Mr. Liberman was in New York, and also those ought to be in before finding number 15. And then there ought to be further findings also as to the occurrences after Mr. Liberman returned from New York and he and Mr. Jenkins talked about, first he was contacted about the option and became ill and, as I recall, didn't complete the meeting. Then Mr. Jenkins spoke to him. In other words, I think those matters ought to be covered so that the story is complete.

On that issue I find the testimony of the plaintiffs with regard to the telephone conversations and the request for a release of the option and also the occurrences in Arizona when Mr. Liberman returned, I find those facts to be in accordance with the testimony of the plaintiffs. You have covered it in your opening memorandum at about pages 8 and 9, not as a finding but a discussion of the evidence. So I would appreciate your making those findings so that it doesn't pass from the giving up of the first right of refusal to the time the agreement was executed in New York.

With respect to finding number 18, I will ask counsel to include the calculations, or in other words, make plain the calculations which the Court stated for the record this morning, as to how the damages and their present value were arrived at so that will be complete. That is finding number 18.

When submitted in accordance with the Court's directions the findings and conclusions will be approved by the Court and settled and made.

For the record, the record may show the defendants' objections to the findings and conclusions are overruled. And the defendants' proposed findings of fact and conclusions of law are rejected.

I will ask counsel to get the new findings and conclusions to me promptly, if you will, please.

Mr. Romley: I beg your pardon?

The Court: I will ask you to get the new draft of the findings and conclusions, in accordance with what I have asked here, to me promptly, please.

Mr. Romley: If we can get those today we will have them here by Wednesday, your Honor.

The Court: Very well. I will then approve, sign and file and serve copies on counsel as filed. If you will send me the original and probably three copies, that I can return one to you and send two to Mr. Moore's office so that they can send them on. Of course counsel have the further right, even after I sign them to make exceptions and objections to those findings. I will sign them and serve them for counsel.

Mr. Romley: That answers my question, and I take it I do not serve opposing counsel?

The Court: If you will send them to me we can send them a conformed copy so that we have an accurate exact copy of the findings.

Mr. Enersen: Is it the Court's intention to award interest from May 13, 1960?

The Court: No. My understanding of the law— I will have to hear from counsel for the plaintiffs, but my understanding of the law is that in an unliquidated matter of this kind the damages run from the day of judgment.

Mr. Romley: I think that is probably correct, if your Honor please, under the Schwartz case cited by counsel. Only one distinction or fact that we should call to the attention of the Court with regard to that. In ruling on that case the Arizona Supreme Court failed to refer to a statute existing in Ari-

zona which we think probably falls within the facts and situation developed in this case. The Court said in the Schwartz case that there is no Arizona statute governing the date from which interest run and especially overruled three earlier decisions that allowed recovery of interest on an unliquidated claim from the time of the commencement of the action. The section to which I refer is Arizona Revised Statutes, 12-347, which says this: "The Clerk of the court shall include in the judgment entered by him the costs and interest on the verdict from the time it was rendered." Now, it would appear to me, if your Honor pleases, that when interest is allowed on a verdict from the date it was entered, similarly it should be allowed on the decision of the Court from the time it was announced, namely on December 30th. I agree that we are not entitled to interest from the day of the submission of the question. Findings were drawn on that theory; I think the better rule is against us on that. I submit we are entitled to interest from the date of the Court's decision, I think December 30 or 31, 1960.

The Court: I am inclined to think that the decision of the Court is very different from the verdict of a jury, and I don't believe it has the same sense of finality so far as the Court's announcement of decision is concerned. I could recompute these, if counsel came in and showed me, "You included

this 21,000,000 feet," and I could change my mind, but a jury couldn't do that. For that reason I am inclined to think in the trial by the Court certainly the interest would date from the date of the judgment, and when the findings come in and are settled and approved I will direct the Clerk to enter a judgment; it will not be a formal written judgment but just be a direction to enter the judgment for this amount with interest from this date at 6 per cent.

We will stand at recess.

[Endorsed]: Filed August 28, 1961.



JUN 20 1961

SCHEDULE SHOWING COMPUTATION BY COURT OF DAMAGES SUSTAINED BY PLAINTIFFS

	<u>PRODUCTION OF AVAILABLE TIMBER BY YEARS</u>		<u>50% OF PROJECTED PROFIT BY YEARS Duke City Aztec @ \$3.00 per M All other timber @ \$4.71 per M</u>		<u>PRESENT VALUE, @ 4%, OF \$1 DUE THE YEARS HENCE SHOWN IN ()</u>	<u>PRESENT VALUE OF 50% OF PRO- JECTED PROFIT</u>
99	Duke City Aztec Existing Forest Service	11,076,600 <u>14,680,000</u>	\$ 16,614.90 <u>34,571.40</u>			
	25,756,600			\$ 51,186.30	.961538 (1)	\$ 49,217.57
00	Duke City Aztec Existing Forest Service Future Forest Service	10,756,600 7,000,000 <u>8,000,000</u>	16,134.90 <u>35,325.00</u>			
	25,756,600			51,459.90	.924556 (2)	47,577.56
01	Duke City Aztec Future Forest Service	15,586,600 <u>10,170,000</u>	23,379.90 <u>23,950.35</u>			
	25,756,600			47,330.25	.888996 (3)	42,076.40
02	Duke City Aztec Future Forest Service	13,106,600 <u>12,650,000</u>	19,659.90 <u>29,790.75</u>			
	25,756,600			49,450.65	.854804 (4)	42,270.61
03	Duke City Aztec Gallagher Aztec Future Forest Service	136,600 13,545,000 <u>12,075,000</u>	204.90 <u>60,335.10</u>			
	25,756,600			60,540.00	.821927 (5)	49,759.46
04	Gallagher Aztec Future Forest Service	3,975,000 <u>12,075,000</u>				
	16,050,000			37,797.76	.790315 (6)	29,872.14
05	Future Forest Service	12,075,000				
	12,075,000			28,436.63	.759918 (7)	21,609.51
06	Future Forest Service	12,075,000				
	12,075,000			28,436.63	.730690 (8)	20,778.36
07	Future Forest Service	12,075,000				
	12,075,000			28,436.63	.702587 (9)	19,979.21
08	Future Forest Service	12,075,000				
	12,075,000			28,436.63	.675564 (10)	19,210.76
09	Future Forest Service	10,443,000				
	10,443,000			24,593.26	.649581 (11)	15,975.31
10	Future Forest Service	10,443,000				
	10,443,000			24,593.26	.624597 (12)	15,360.88
11	Future Forest Service	10,443,000				
	10,443,000			24,593.26	.600574 (13)	14,770.07
12	Future Forest Service	10,443,000				
	10,443,000			24,593.26	.577475 (14)	14,201.99
13	Future Forest Service	10,443,000				
	10,443,000			24,593.26	.555265 (15)	13,655.78
	<u>245,348,000</u>			<u>\$534,477.68</u>		<u>\$416,315.61</u>

<u>EXISTING TIMBER - NET LUMBER RECOVERY</u>			
<u>Duke City Aztec</u>	<u>Gallagher Aztec</u>	<u>Forest Service</u>	<u>Total</u>
11,076,600			
10,756,600	13,545,000	14,680,000	
15,586,600	3,975,000	7,000,000	
13,106,600			
136,600			
<u>50,663,000</u>	<u>17,520,000</u>	<u>21,680,000</u>	<u>89,863,000</u>

<u>RECAPITULATION OF TIMBER</u>	
Duke City Aztec	50,663,000
Gallagher Aztec	17,520,000
Existing Forest Service timber	21,680,000
Future Forest Service timber	<u>155,485,000</u>
	<u>194,685,000</u>
	<u>245,348,000</u>

<u>FUTURE TIMBER - NET LUMBER RECOVERY</u>			
Forest Service Contract to be awarded 5/31/60 and to be cut by 5/31/62	30,820,000		
Forest Service Contracts to be awarded and to be cut in years 1963 to 1973 inclusive	<u>124,665,000</u>	<u>155,485,000</u>	
TOTAL		<u>245,348,000</u>	

<u>RECAPITULATION OF DAMAGES</u>	
Total Damages Sustained by Plaintiffs, Reduced to Present Value	\$416,315.61
Minus Present Value of Interest Computed on Purchase Price	<u>48,750.00</u>
TOTAL NET DAMAGES Sustained by Plaintiffs, per Judgment	<u>\$367,565.61</u>



[Title of District Court and Cause.]

COMMENTS OF MR. ENERSEN ON
COURT'S FINDINGS

June 12, 1961

(This portion of transcript to be inserted on page 6, line 3, following remark by the Court.)

Mr. Enersen: This of course produces an award of a little over 100 per cent of the amount of the investment which the plaintiffs would have been required to make, wherein the plaintiffs' investments would have been \$325,000 in installments, representing half of the purchase price of 650,000. So that in analyzing the award we were pretty well driven to the conclusion that it was not based upon the ordinary rule. If this award for example were added to the investment of \$325,000 which would be required to put plaintiffs in the position of realizing these anticipated profits, it would indicate that the value of the plaintiffs' contract in the fall of 1958 was the sum of those two figures or almost \$700,000. It would indicate also that the total value of the project, considering the fact that plaintiff was to be only a half owner, was about \$1,400,000. And this of course is to be contrasted with the only evidence which appears in the record, so far as I know, relating to the value of the Gallagher mill and the position in the forest at that time. That is the testimony of one of plaintiffs' witnesses, Mr.

Jenkins, who said that in his opinion the reasonable value of the entire establishment was \$500,000. That was very carefully brought out and would include not only the value of the mill but also the value, if any, of the position in the forest which the ownership of this mill would represent. And of course that happens to be the same price at which, according to the evidence, the owners of the mill were willing to sell the mill and the position in the forest for in August of 1958.

Mr. Jenkins also said that he knew of no change in conditions between August and October which would have changed the value of the establishment in his opinion. So it appears that in making this award the Court has conceived that the establishment at that time, including discounted future profits, was worth approximately \$1,400,000.

Now, I would like, if the Court will hear me, to discuss for a minute the possible applicability of the future profits rule to this contract. I realize that in a hearing on settlement of findings and conclusions this may be anticipatory to some extent, but in reviewing the record and in listening to your Honor's statement this morning, it appears that the case has been presented and decided upon the basis of the rule of *Martin versus LaFon* decided here in the Arizona Supreme Court, in which an award was made or the Supreme Court held it was proper to make an award based upon future anticipated profits; by contrast of course with the ordinary rule of damages for the breach of contract to purchase

real estate. In the Martin versus LaFon case, as I understand the transaction, two parties bargained between themselves specifically for the opportunity to continue a going business at the same location, in the same manner, for the same purposes, with the same good will as was already in effect under the management of one of the parties. And it was made clear from the evidence in that case they were not bargaining for the acquisition of a piece of real estate, an interest in real estate represented by a lease or an inventory or personal property, but instead were bargaining directly for the opportunity to engage jointly in a business for the purpose of making and keeping the profits which it would produce.

The evidence in this case, if I can comment upon it briefly, seems to me to fall far short of a basis for a finding that this contract represented the result of a bargain by plaintiffs and defendants for the opportunity to continue the operation of the Gallagher mill as a going business for the express and primary purpose of realizing the profits which it could produce if continued upon its then operating program. The evidence is uncontradicted, as far as I am aware, that the purpose of the defendant in seeking to obtain this property was to obtain a mill, a lumber mill, in which defendants could be assured of the opportunity of manufacturing lumber from timber which they already controlled, but for which they had no milling facility.

It was also stated in the record several times that defendants' interest in this mill operation would have a rather short life, probably seven years, after which the timber which the defendants were hoping to process through this mill would be exhausted. There is no dispute I believe in the evidence that that was the basic objective of the defendants.

Now, it is true that on cross examination on a deposition, I believe the principal witness for the defendants, Mr. Liberman, did testify that he expected to realize profits from the operation of the mill. He also testified that at that time, when he was making this bargain, the mill was a going business. And the plaintiffs have very consistently and energetically, earnestly urged that by the happenstance that it was a going business, and that Mr. Liberman testified he hoped to make profits out of a joint operation, that this brought the case within the rule of *Martin versus LaFon*.

Looking at the plaintiffs' evidence as to what they were seeking to accomplish, we find a wholly different objective. We find first that the plaintiffs were thoroughly aware of the objectives of the defendants. It was explained and discussed, and plaintiffs' testimony, both of Mrs. Nagel and Mr. Jenkins, clearly establishes full knowledge of the objective of the defendants which would be to obtain a mill for the manufacture of their raw material. It also shows, and without any contradiction so far as I

am aware, that their primary objective in seeking to become an owner or a part owner of the Gallagher property was that it would give the plaintiffs what they call a position in the forest, by which in the relatively near future they could obtain additional raw material, additional timber to process in the lumber mill which they already owned, the so-called Nagel mill. It is also quite clear that this objective was carefully explained to the defendants, and that the defendants knew that the plaintiffs were hoping to obtain the mill for that specific purpose.

Thus we have a situation in which the two parties, plaintiffs and the defendants, were seeking to acquire this property or an interest in the property for two entirely different objectives, the objectives of each being clearly known to the other. These facts were explained by the principal witness for the plaintiffs, Mrs. Nagel, not once, but a number of times, as being a kind of a natural situation for cooperation, since her objective, the objective of her company, was to obtain an additional supply of raw material, not immediately but in the near future; and the objective of the defendants, who already had raw material, was to obtain a manufacturing plant.

Now, with these two completely different objectives we find in the record a complete absence of any agreement or evidence of even a serious discussion of an agreement for joint operation of the

lumber mill during the time when Mr. Gallagher—Mr. Liberman, beg your pardon,—was getting his existing supply processed and during the time when plaintiffs really had no need for the mill because they still had all the lumber they needed. In several places in the record this subject was explored very carefully with the witnesses for the plaintiffs and it was demonstrated beyond any doubt that this subject of joint operation had been left completely out of the discussion. There was no agreement as to who would put up working capital, there was no agreement as to how the timber would be sold, and there was no agreement as to who would have management of the mill, although there was a reference a time or two to the possibility that Mr. Jenkins might be a good manager for the Gallagher operation after they acquired it.

Now, with this type of program in the minds of the two parties, where joint operation was the last thing that they would have needed to discuss and never actually ever got to a discussion of that subject, I confess I am a little bit puzzled as to how the Court can find a basis for the application of the Martin versus LaFon rule, which depended upon a clear bargain, where both parties were seeking to operate jointly, and that was not only their primary objective but virtually their only objective, to make money out of continuing an existing business.

This is, if the Court please, the principal reason why we were asking, as I did, for a specification of the method on which the Court had arrived at this figure, because we thought for a moment there might have been perhaps some exemplary damages included in this award; I am happy to see there were not. There was no prayer for exemplary damages and I could find no basis upon which they could be assessed, because in reviewing the record of the discussions of the parties and their actions, action of the parties under this agreement, it seemed very clear to me there was a complete failure of any meeting of the minds as to what that contract meant, and there was no evidence as far as I could detect as to any bad faith on the part of either party in pursuing what it thought were its proper rights and obligations under the agreement as it interpreted it. So I am happy to see the Court has not determined to make an award in any respect based upon an award of exemplary damages.

With those comments, if the Court please, we will submit the matter.

[Endorsed]: Filed August 28, 1960.

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried to the Court without a jury, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

I. At the time of the commencement of this action plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins, Georgia Mae Jenkins and James Henry Nagel were citizens and residents of the State of Arizona.

2. At the time of the commencement of this action defendants Maurice Liberman, Joseph Grevey and Jack Grevey were citizens and residents of the State of New Mexico.

3. The amount in controversy exclusive of interest and costs exceeds the sum of \$10,000.00.

4. Plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins and Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, trustee for James Henry Nagel, limited partner, at all times herein mentioned were and they now are the sole members of a limited partnership existing under the laws of the State of Arizona and doing business as Nagel Lumber & Timber Company.

5. Defendants Maurice Liberman, Joseph Grevey and Jack Grevey at all times herein mentioned were

and they now are the sole members of a partnership existing under the laws of the State of New Mexico and doing business as Duke City Lumber Company.

6. At all times herein mentioned plaintiffs were and they now are engaged in the operation of a business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public.

7. On and prior to September 20, 1958, the New Mexico Timber Company, a New Mexico corporation, the Arizona Timber Company, an Arizona corporation, and the Bernalillo Lumber Company, a partnership consisting of A. I. Kaplan and T. P. Gallagher, partners, owned and engaged in the business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public. Said corporations and partnership collectively hereinafter will be referred to as "the Gallagher Companies" and said business enterprise, together with certain physical assets, easements, leases and timber contracts appurtenant thereto, hereinafter will be referred to as the "Gallagher Properties."

8. Prior to September 23, 1958 the Gallagher business operations and the plaintiffs' business operations were substantially identical. Their timber sources, physical plants, costs of operation, quantity, quality and type of product were substantially the same.

9. For many years prior to September 20, 1958, plaintiffs and the Gallagher Companies had an agreement whereby, in the event either the plaintiffs or the Gallagher Companies offered for sale either of their respective above described business enterprises, the other party would have the right of first refusal to purchase the business enterprise so offered for sale. During 1958 and shortly prior to September 23, 1958, the Gallagher Companies did offer the Gallagher Properties for sale. Pursuant to said agreement plaintiffs and the Gallagher Companies were actively engaged in negotiations for the purchase of the Gallagher Properties.

10. On September 10, 1958 defendants commenced negotiations for the purchase of the Gallagher Properties. On that day T. P. Gallagher advised defendants that the Gallagher Companies had an existing oral reciprocal first refusal agreement with the plaintiffs and that any sale to defendants would be subject to plaintiffs' first refusal. Thereupon defendants contacted plaintiffs and arranged for a conference which was held in Winslow, Arizona, on September 20, 1958.

11. At this conference plaintiffs and defendants agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties; that defendants would then proceed to negotiate a purchase thereof; that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase; that in the event plaintiffs exercised their said option, then the business enterprise herein referred to as the Gallagher Properties thereafter would be jointly owned and operated by plaintiffs and defendants for the purpose and in the expectation of making a profit; and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly-acquired mill under the terms and at the prices specified in the milling agreement received in evidence as plaintiffs' Exhibit 5.

12. On September 22, 1958, defendants prepared the document received in evidence as plaintiffs'

Exhibit 3 which the parties signed on September 23, 1958 and reads as follows:

“September 23, 1958

“Mrs. George H. Nagel
Nagel Lumber & Timber Company
Winslow, Arizona

“Dear Mrs. Nagel:

“It is our understanding that you have a ‘first refusal agreement’ with Arizona Timber Company to buy out their Plant at Winslow; and, if you turn down this option it is our understanding that we are second in line to buy the Plant.

“It is now mutually agreed that in case either of us (and by this is meant, the companies controlled by the Liberman Group as one party; and the Nagel Lumber and Timber Company or any company controlled by the Nagel Family as the second party) will take-up the proposition made by Arizona Timber Company and buy out the Winslow Plant from them, then our companies will have the option to participate in that purchase on a fifty-fifty basis at the same terms as the purchaser will get from the Arizona Timber Company.

“This option remains in force until April 30, 1959, and will be automatically extended for six

month periods unless cancelled by mutual consent.

“Very truly yours,

MAURICE LIBERMAN

Maurice Liberman

“Liberman Group

By: MAURICE LIBERMAN

Nagel Family

By: ROBERT T. JENKINS

“ML:rb”

12. (a) From the conversations and negotiations of the parties carried on at the meeting of September 20, 1958 and from the language of Exhibit 3 in evidence the plaintiffs understood at the time Exhibit 3 was executed by the parties, and the defendants then knew or had reason to know that the plaintiffs understood from such conversations and negotiations and from the language of Exhibit 3, that plaintiffs and defendants had contracted and agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties; that defendants would then proceed to negotiate a purchase thereof; that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the

purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase; that in the event plaintiffs exercised their said option the plaintiffs and defendants, in addition to operating the business would share equally the obligation to provide any capital necessary therefor, as well as share equally the profits and losses of the business; and that defendants privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly acquired mill, under the terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5.

13. At the time of the execution of Exhibit 3 by plaintiffs and defendants the business enterprise herein referred to as the Gallagher Properties was a going business earning and capable of earning substantial profits, which plaintiffs and defendants contemplated said business would continue to earn in the future.

14. On September 23, 1958, plaintiff released the Gallagher Companies from their first refusal agreement and withdrew from further negotiations with the Gallagher Companies for the purchase of the Gallagher Properties.

14. (a) Following protracted negotiations in New York between defendant Maurice Liberman and the owners of the Gallagher Properties an agreement for sale of said Properties was reached

on October 16, 1958 at about 2:00 A.M. subject to final approval by both buyers and sellers at 11:00 A.M.

14. (b) In the early morning hours of October 16, 1958 plaintiff Mabel J. Nagel received a phone call in Winslow from defendant Liberman in New York. He requested that plaintiffs release defendants from the option agreement and send him a telegram to that effect as soon as possible. She replied that she did not think she would do that but would check with plaintiff Robert T. Jenkins, and she did. At 8:29 A.M. Mrs. Nagel sent Liberman a telegram stating "Do not wish to release options at this time."

14. (c) In a later phone call on October 16, 1958, Liberman told Mrs. Nagel the price of the plant and timber but did not reveal that the terms were credit rather than cash. He acknowledged receipt of the aforesaid telegram and asked Mrs. Nagel to come to New York. She replied that she could not come. Plaintiffs did not see or hear from defendants again until mid-November, 1958.

14. (d) On October 17, 1958 a tentative draft of the purchase and sale agreement was executed by defendants and the Gallagher Companies.

15. On November 6, 1958, defendants and the Gallagher Companies entered into a written contract whereby the Gallagher Companies agreed to **and did** sell and the defendants agreed to **and did** purchase the Gallagher Properties.

15. (a) In mid-November, 1958, Jenkins approached Liberman for the purpose of discussing defendants' purchase of the Gallagher Properties. Liberman stated that he would be in Winslow shortly and would get in touch with Jenkins but did not do so on account of illness.

15. (b) On December 23, 1958 plaintiffs asked to see the contract for the purpose of deciding whether or not to exercise their option, but defendants refused to allow them to see a copy.

16. On January 6, 1959, plaintiffs for the first time learned the terms of defendants' aforesaid purchase, and on that day they advised defendants they elected to exercise their option to purchase said undivided one-half interest in the Gallagher Properties and offered to pay one-half of the purchase price. At the time of so electing the agreement of September 20, 1958 between plaintiffs and defendants was still in full force and effect, the defendants had not been released from their obligations thereunder, and plaintiffs had done all things required of them by said agreement. Also, at the time of so electing, the plaintiffs were ready, able and willing to consummate the purchase of said one-half interest.

17. Defendants refused and ever since have refused to allow plaintiffs to exercise such option and acquire said undivided one-half interest.

18. Plaintiffs claim that defendants owed the Gallagher Companies timber (referred to in plain-

tiffs' Exhibit 9 as "owed by Duke City") from which there would have been a net lumber recovery of 21,217,000 board feet; and they further claim that they are entitled to share in the profits which said 21,217,000 board feet would have produced, computed on the same profit basis as the Gallagher Aztec and the Forest Service timber. This claim is not supported by the evidence and the amount of net lumber recovery represented thereby has not been taken into consideration by the court in its calculation of damages sustained by plaintiffs.

19. The present value of one-half of the net profits reasonably certain to have been derived from the operation of the Gallagher Properties by plaintiffs and defendants is the sum of \$429,883.40. If the parties had gone ahead pursuant to the agreement between them:

(a) The Gallagher Properties would have been operated during the years 1959 to 1973 inclusive, at a joint profit to the parties of \$3.00 per 1,000 board feet as to the Duke City Aztec and of \$4.71 per 1,000 board feet as to the Gallagher Aztec and Forest Service timber.

(b) There would have been a net lumber recovery to the parties of 71,880,000 board feet from the Duke City Aztec, as to which the parties would have derived a profit of \$3.00 per 1,000 board feet which would have produced a joint profit to the parties of \$215,640.00; and the share of plaintiffs therein would have been one-half of that sum, or \$107,820.00.

(c) There would have been a net lumber recovery to the parties of 194,685,000 board feet from what the evidence refers to as Gallagher Aztec and Forest Service timber, as to which the parties reasonably could anticipate a profit of \$4.71 per 1,000 board feet. This would have produced a joint profit to the parties of \$916,966.35; and the share of plaintiffs therein would have been one-half of that sum, or \$458,483.18.

(d) Plaintiffs' share of the aforesaid net profits aggregates \$566,303.18; the present value of this sum at the rate of 4% is \$478,633.40.

(e) The interest which plaintiffs would have been required to pay on the purchase price amounts to \$48,750.00. The net damage, therefore, is \$429,883.40.

(f) The damages sustained by plaintiff

as follows:

SCHEDULE SHOWING COMPUTATION BY COURT OF DAMAGES SUSTAINED BY

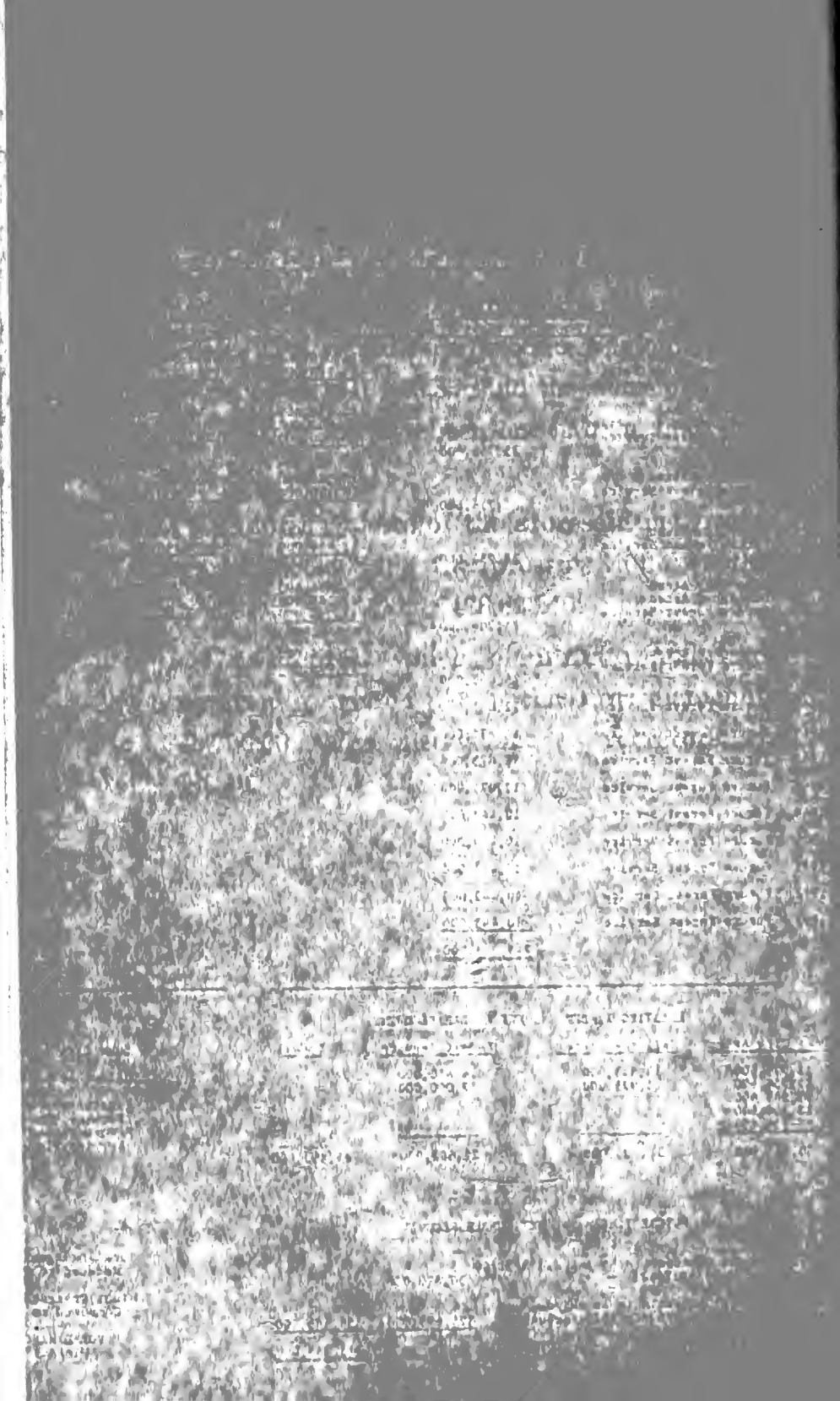
		<u>PRODUCTION OF AVAILABLE TIMBER BY YEARS</u>	<u>50% OF PROJECTED PROFIT B</u> Duke City Aztec @ \$3.00 All other timber @ \$4.71	
1959	Duke City Aztec Existing Forest Service	11,076,600 <u>14,680,000</u>	\$ 16,614.90 <u>34,571.40</u>	\$ 51
1960	Duke City Aztec Existing Forest Service Future Forest Service	10,756,600 7,000,000 <u>8,000,000</u>	16,134.90 <u>35,325.00</u>	51
1961	Duke City Aztec Future Forest Service	15,586,600 <u>10,170,000</u>	23,379.90 <u>23,950.35</u>	47
1962	Duke City Aztec Future Forest Service	13,106,600 <u>12,650,000</u>	19,659.90 <u>29,790.75</u>	49
1963	Duke City Aztec Gallagher Aztec Future Forest Service	136,600 13,545,000 <u>12,075,000</u>	204.90 <u>60,335.10</u>	60
1964	Gallagher Aztec Future Forest Service	3,975,000 <u>12,075,000</u>		37
1965	Future Forest Service	12,075,000		28
1966	Future Forest Service	12,075,000		28
1967	Future Forest Service	12,075,000		28
1968	Future Forest Service	12,075,000		28
1969	Future Forest Service	10,443,000		24
1970	Future Forest Service	10,443,000		24
1971	Future Forest Service	10,443,000		24
1972	Future Forest Service	10,443,000		24
1973	Future Forest Service	<u>10,443,000</u>		24
		<u>245,348,000</u>		<u>\$534</u>

EXISTING TIMBER - NET LUMBER RECOVERY

<u>Duke City Aztec</u>	<u>Gallagher Aztec</u>	<u>Forest Service</u>	<u>Total</u>	
11,076,600	13,545,000	14,680,000		Duke City Aztec
10,756,600	3,975,000	7,000,000		Gallagher Aztec
15,586,600				Existing Forest
13,106,600				Service timber
136,600				Future Forest
				Service timber
<u>50,663,000</u>	<u>17,520,000</u>	<u>21,680,000</u>	<u>89,863,000</u>	

FUTURE TIMBER - NET LUMBER RECOVERY

Forest Service Contract to be awarded 5/31/60 and to be cut by 5/31/62	30,820,000			Total Damages Reduced to P
Forest Service Contracts to be awarded and to be cut in years 1963 to 1973 inclusive	<u>124,665,000</u>	<u>155,485,000</u>		Minus Present Computed on
TOTAL		<u>245,348,000</u>		TOTAL NET Plaintiff



Conclusions of Law

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Plaintiffs and defendants entered into a valid, lawful contract whereby the plaintiffs were granted an option until April 30, 1959 to purchase from defendants an undivided one-half interest in the Gallagher Properties in the event of their acquisition by defendants.

3. Plaintiffs fully performed their part of said agreement and on January 6, 1959 elected to purchase from defendants said undivided one-half interest in the Gallagher Properties in accordance with the aforesaid agreement.

4. Defendants breached the aforesaid agreement between plaintiffs and defendants by refusing to allow plaintiffs to exercise their aforesaid option.

5. Plaintiffs are entitled to recover from defendants, and each of them, as damages for breach of said contract, the present value of one-half of the net profits reasonably certain to have been derived from the operation of the Gallagher Properties by plaintiffs and defendants.

6. Plaintiffs have been damaged in the sum of \$429,883.40 and are entitled to judgment against defendants, and each of them, for said sum together with interest thereon from the date of judgment until paid at the rate of 6 per cent per annum.

7. Some of the findings of fact heretofore made necessarily involve matters of both fact and law. To the extent that any finding of fact may be construed more properly as a conclusion of law, the same hereby is adopted and incorporated herein as a conclusion of law.

Let judgment be entered accordingly.

Dated this 20th day of June, 1961.

/s/ JAMES A. WALSH,
U. S. District Judge.

[Endorsed]: Filed June 20, 1961.

[Title of District Court and Cause.]

May 1961 Term

At Tucson

MINUTE ENTRY OF JUNE 20, 1961
(Prescott Division)

Honorable James A. Walsh, United States District
Judge, Presiding Civ-610 Prescott

The Clerk is directed to enter judgment forthwith in favor of the plaintiffs and against the defendants and each of them for the sum of \$367,-565.61 with interest thereon at 6% per annum from this date until paid. The Court will also file and place among the exhibits in the cause the enlarged copy now delivered to the Clerk of the schedule set forth on page 10 of the Findings of Fact and Conclusions of Law.

* * * * *

[Title of District Court and Cause.]

Civil Docket

Civ-610 Pct.

PROCEEDINGS

Date

1961

June 20—Enter judgment for the pltfs. George H. Nagel, Mabel J. Nagel, Robert T. Jenkins & Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, Trustee for James Henry Nagel, limited partner, dba Nagel Lumber & Timber Company, a limited partnership and against the defendants Maurice Liberman, Joseph Grevey & Jack Grevey, co-partners dba Duke City Lumber Company, and Duke City Lumber Company, a partnership, in the sum of \$367,565.61 with int. thereon at 6% per annum from this date until pd.

Date Order or Judgment Noted 6/20/61.

* * * * *

[Title of District Court and Cause.]

DEFENDANTS' MOTION, UNDER RULE 52
(b), FEDERAL RULES OF CIVIL PRO-
CEDURE, TO AMEND THE FINDINGS,
TO MAKE ADDITIONAL FINDINGS,
AND TO AMEND THE JUDGMENT AC-
CORDINGLY AND SEPARATE MOTION
FOR NEW TRIAL AS TO DAMAGES
ALONE

Defendants move the Court for an Order amend-
ing its findings herein, making additional findings,
and amending the Judgment accordingly in the
following respects:

1. Finding of fact numbered 11, page 4, line
7, by striking out the words "until April 30, 1959."

2. Finding of fact numbered 12(a), page 6, line
1, by striking out the words "April 30, 1959," and
inserting in place thereof the words "cancelled by
mutual consent."

3. Finding of fact numbered 12(a), page 6,
lines 6-10, by striking out the words "that in the
event plaintiffs exercised their said option the
plaintiffs and defendants, in addition to operating
the business, would share equally the obligation
to provide any capital necessary therefor, as well
as share equally the profits and losses of the busi-
ness; and that defendants privately owned Aztec
timber would be manufactured by plaintiffs and
defendants in the newly acquired mill, under the

terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5."

4. Page 6, line 13, by inserting a new finding 12(b) to read as follows "At the time plaintiffs executed Exhibit 3 in evidence they knew that the language of Exhibit 3 in evidence did not reflect their understanding of the agreement they believed they had reached with defendant Liberman during the oral discussions of September 20. However, plaintiffs signed Exhibit 3 in evidence because they saw nothing in the changes which they noticed which could hurt them."

5. Finding of fact numbered 14(b), page 7, line 7, by adding an "s" to the end of the word "option."

6. Finding of fact numbered 14(c), page 7, lines 9-10, by striking out the words "but did not reveal that the terms were credit rather than cash," and by inserting a new sentence to read as follows: "Mrs. Nagel still refused to come to New York, and Mr. Liberman then committed himself to purchase the Gallagher Properties. After he had thus committed himself, he received Mrs. Nagel's telegram. He thereupon telephoned Mrs. Nagel again."

7. Finding of fact numbered 15, page 7, line 20, by inserting after the end of the sentence a new sentence to read as follows: "By the terms of this written contract, the agreement under which the Gallagher Companies were to mill defendants' pri-

vately owned Aztec timber was expressly terminated.”

8. Finding of fact numbered 16, page 8, line 5, by striking out the period and inserting in place thereof a comma and then inserting the words “and generally to participate on exactly the terms defendants had secured under the written contract dated November 6, 1958.”

9. Finding of fact numbered 16, page 8, line 6, by striking out the words “September 20,” and inserting in place thereof the words “September 23.”

10. By adding a new finding of fact numbered 11(g) to read as follows: “In arriving at the figure \$367,565.61, neither the cost of the capital which plaintiffs would have been required to invest nor the cost of plaintiffs’ performance have been taken into consideration.”

11. Defendants hereby incorporate by reference as if fully set forth at this point Defendants’ Objections to Plaintiffs’ Proposed Findings of Fact and Conclusions of Law and Defendants’ Proposed Findings of Fact and Conclusions of Law, filed with this Court and served on plaintiffs January 31, 1961.

A Memorandum of Points and Authorities is attached hereto and made a part hereof.

Dated: June 29, 1961.

/s/ BURNHAM ENERSEN,

Attorney for Defendants.

McCUTCHEN, DOYLE, BROWN &
ENERSEN, JENNINGS, STROUSS,
SALMON & TRASK

[Title of District Court and Cause.]

MOTION UNDER RULE 59, FEDERAL RULES
OF CIVIL PROCEDURE, FOR A NEW
TRIAL AS TO DAMAGES ALONE

Defendants move the Court for an Order Granting a New Trial as to damages alone in the above-entitled action in which Judgment was entered on June 20, 1961, because the damages awarded are excessive on the following grounds:

- (1) Error in projecting future profits on the basis of Forest Service timber not under contract.
- (2) Error in not allowing a sufficient factor for risk and hazard.
- (3) Error in projecting future profits over too long a period.
- (4) Error in not taking into consideration the cost of the capital which Plaintiffs would have been required to invest.
- (5) Error in not taking into consideration the cost of Plaintiffs' performance.

All of the above more fully appears from the Affidavit of Arnold F. Wallen and from the Memo-

randum of Points and Authorities, both of which are attached hereto and made a part hereof.

Dated: June 29, 1961.

/s/ BURNHAM ENERSEN,
Attorney for Defendants.

McCUTCHEM, DOYLE, BROWN &
ENERSEN JENNINGS, STROUSS,
SALMON & TRASK

[Title of District Court and Cause.]

AFFIDAVIT OF ARNOLD F. WALLEN

State of California,

City and County of San Francisco—ss.

Arnold F. Wallen, being first duly sworn, deposes and says:

1. Affiant is a resident of Oakland, California, where for many years he has been in the business of serving the forestry industry in California, Arizona and elsewhere in the Western States by providing forestry appraisals, timber stand classifications, management plans, growth studies, inventory analyses, mapping services and management and consulting services of all kinds. Affiant is and has been since 1949 a member of the forestry servicing firm of Hammon, Jensen & Wallen, in Oakland, California. After attending the Oregon State College School of Forestry, Affiant was employed by the United States Forest Service and the Department of Natural Resources of the State of

California for several years prior to joining his present firm. During part of that time he was responsible for the administration of Forest Practices throughout the North Coast District of California. Affiant is a co-author of the "Redwood Forest Handbook" published in 1948. He is a senior member of the American Society of Foresters.

2. At the request of counsel for defendants in this case, Affiant has examined the Findings of Fact and Conclusions of Law signed by the Honorable James A. Walsh in this case June 20, 1961. Affiant has been asked by counsel for the defendants to comment upon Finding No. 19 and the computations therein set forth. In said Finding No. 19 the Court has undertaken to estimate the profits reasonably to be anticipated over a fifteen-year period commencing in 1959 from a 50% interest in a certain lumber mill known as the Duke City Mill at Winslow, Arizona.

3. In the opinion of Affiant the basic technique used by the Court in computing the present value of the estimated future profits of a lumber mill is sound. In the lumber industry one permissible method of appraising a lumber mill and appurtenant timber resources is to apply the expected margin of profit to projected future operations with assured timber supplies. In effect this is what the Court has done. The rates of profits used by the Court appear to Affiant to be reasonable when

compared with other operations in the Southwest in 1958 and 1959.

At study of this schedule, however, reveals that an improper method of determining present value has been employed and in addition it reveals a number of assumptions which in Affiant's opinion are questionable:

(a) The Court in appraising the present value of the properties has improperly taken into account timber not under firm contract.

(b) Allowance is made for interest only and no allowance is made for risk.

(c) The overrun of 15% available on Forest Service sales in the past is projected throughout the schedule.

(d) It is assumed that the mill will be able to continue operations on an annual cut of 10 to 12 million board feet, which is less than half the capacity of the mill, while profits will continue at the same rate per thousand board feet as in the case of operations at full capacity.

Specific comment will be offered regarding these four points.

4. With respect to Point (a), "Availability of Forest Service Timber": In appraising a lumber mill and timber resource, only the timber under firm contracts is taken into account. The Court's schedule shows the "Production of Available Timber by Years." According to this schedule the only timber actually available to the Winslow Duke City Mill

in 1959 was the Aztec timber and the Forest Service timber covered by a then existing Forest Service timber sale contract. This schedule shows that there are 89,863,000 board feet of timber actually available to the mill. Thus, of the reported 245,348,000 board feet in this schedule, the remainder, or 155,485,000 board feet, was not actually available to the mill but, instead, would be subject to competitive bidding under U. S. Forest Service timber sale procedures. In Affiant's opinion, only the timber actually under contract could logically have a value.

It is true that the timber indicated as "Future Forest Service" is timber volume, in the Chevelon Working Circle on the Sitgreaves Forest, which the Forest Service plans to sell. However, a mill operator cannot count on getting Forest Service timber. Some of the reasons for this are:

(a) The Forest Service will not guarantee to provide timber for any mill. All timber is sold on a competitive bidding basis if the timber is available.

(b) A fire could reduce or completely eliminate the allowable cut from the Chevelon Working Circle. This has happened all too frequently in the past. A number of timber sales have been curtailed because of fire losses on National Forests and Indian Reservations in Arizona and New Mexico. In California severe fires during 1959 and 1960 stopped timber sales on the Tahoe and El Dorado Forests. A number of mills counting on this Forest Service

timber have already shut down or will soon be closing their doors when salvage operations are completed.

(c) After the Aztec timber has been depleted the mill, theoretically, will be operating on Forest Service timber. The annual mill production will then drop to 12 million and then further to 10 million board feet. The subject mill was designed to produce maximum profits with a production of 25 million board feet or more. When mill production is cut in half profits are sure to fall or become non-existent. This would open the way for a competitor to install a new and efficient mill designed for the small Forest Service annual cut. His profits would be greater so he could bid more for the timber. Thus, the present mill would be forced out of business. This is a familiar pattern for sawmills dependent on Forest Service timber sold on a bid basis.

In the opinion of Affiant it is not logical to assume that the Winslow mills will continue to exist on Forest Service timber sales. As long as these mills have a backlog of private timber they have some insurance. But if a mill, entirely dependent on Forest Service timber, misses one sale it is out of business. It is far more likely that as competition for Forest Service timber increases the old existing mills will lose out.

5. With respect to Point (b), "Allowance for Risk": The element of risk in forest industries is

great. Losses from fire, both in the timber and in the mill, instability of the lumber market, and the seasonal nature of operations all add to this risk. In the current standard work on the economics of the forestry industry entitled "Forest Valuation" by Chapman and Meyer, published in 1947, the following comment appears at page 473:

"In competitive industries, prudent investors have consistently allowed a risk rate of three to four times that of pure interest. Thus, the risk is the larger element of the two in choosing the discount rate for appraisal of net worth. Only in risk-free enterprises can present worth legitimately be found on the basis of discounting net income at pure interest rates."

Customarily the risk discount used in the appraisal of future profits of a forest property ranges from 6 to 12 percent. The Forest Service often applies Hoskold's formula for this purpose. In most valuations for investment, loan and other fair market value appraisal work, this is the formula normally used.

This discount for risk is applied in addition to the discount (customarily at 4%) for what is usually called "pure interest." Thus, the total discount in determining the present value of estimated future profits in the forest industry consists of two parts, one of them being a discount of 4% per year for interest and the other being a discount of from 6% to 12% per year for the risk factor of the industry.

6. With respect to Point (c), "Overrun Allowance": Another factor allowed in the Court's schedule is the uniform application of a 15 percent "overrun." That is, that for each 1,000 board feet of logs purchased, it is assumed the mill will recover 1,150 board feet of lumber.

However, there is no reason to believe that this overrun will continue. The Forest Service does not guarantee overrun. The Forest Service National Forest Scaling Handbook specifically states, "Assurances or promises of the amount of overrun which will be obtained in a sale must never be given."

In the opinion of Affiant, no allowance should be made for overrun in computing estimated future profits from Forest Service timber.

7. With respect to Point (d), "Depreciation and Fixed Profit": The Court's schedule for the 15-year period assumes that the mill will continue to operate after 1962 on a cut reduced by more than 50% and that profits will remain the same. Obviously this is impossible. Even if the mill were assured of getting the Forest Service timber, it could not continue to operate at the same profit per unit of production (thousand board feet) when the volume of timber being processed through the mill is less than half of its normal capacity.

Usually a mill will cease to operate if its cut is reduced in half. Certain fixed costs remain the same as when operating at full capacity.

A further review of depreciation is also necessary as the life of the mill is reduced to the timber actually under contract.

8. If, however, the Court should conclude that the 15-year projected timber cutting volume is reasonable and appropriate and should determine that the full 15 years of prospective operations on this basis should be taken into account, and the Court should also conclude that no adjustment should be made to correct estimated overrun or depreciation rates, then in any event an adjustment should be made for the risk factor described above. Applying the 7% factor, which in the opinion of Affiant is a reasonable allowance for risk for this property, the adjustment of the Court's net figure would be as follows:

Present value of future profits as found by the Court.....	\$367,565
Reduction for risk factor at 7% (.5558)	163,273
	<u>\$204,292</u>

9. In the opinion of Affiant further study and analysis of the pertinent facts would be required in order to arrive at a proper appraisal of the present value of estimated future profits of the Duke City Winslow Mill as of January 1, 1959. It has not been possible to complete such a detailed

study and analysis since June 22, 1961, when the Court's detailed computation set forth in Finding No. 19 first became available.

/s/ ARNOLD F. WALLEN.

Subscribed and sworn to before me this 27th day of June, 1961.

[Seal] /s/ IRVING J. CHASE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 29, 1961.

[Title of District Court and Cause.]

HEARING ON MOTION AND DEFENDANTS' ARGUMENT

The Above Entitled Matter came up for further hearing on Defendants' Motion for Amendment of Findings and discussion on the motion for new trial as to damages, on the 20th day of July, 1961, at Prescott, Arizona, before The Honorable James A. Walsh, Judge, and the following proceedings were had, to-wit:

The Court: Suppose we take up the defendants' motion first.

Mr. Enersen: Very well, your Honor.

The defendants' motion for amendment of findings with respect to all matters other than damages, the defense will submit upon the briefs filed. I

should like, if the Court please, to proceed to discuss the motion for new trial as to damages and the request for amendment of findings accordingly.

In connection with that discussion I should like to refer, if the Court please, to Finding 19, particularly Subdivision (b) and (c) on page 9, and I should like, if the Court will permit, to inquire as to the derivation of the rate of assumed profit on \$4.71 per thousand mentioned in Item C at the time of the hearing in June in Tucson, when we were first given the Court's formula for the computation of damages. This rate of \$4.71 per thousand was stated by the Court for the first time and I should have, but failed, to inquire as to how it was derived.

The Court: It was arrived at by taking the testimony of both parties, the Nagels and the defendants, and analyzing it. It was arrived at by determining the gross and then deducting the depreciation and making deductions for risk and uncertainty; and I considered all of the testimony and balanced the respective claims of the parties and their testimony in regard to what gross and net should be and came up with the figure of \$4.71. I don't have the figures here now. I may have them in Tucson still, but I don't have them here this morning. I didn't attempt to dig up my old notes. But that was the way it was done.

Mr. Enersen: Thank you, your Honor.

I have the same inquiry as to the figure of \$3 in finding B.

The Court: That was based upon the testimony that the parties had agreed they would mill this, as I remember, \$3 per thousand, and a depreciation charge of another figure, I can't remember; of course the depreciation figure would not be a profit. So this is the \$3 that, under the testimony, had been agreed upon between the parties for what they would be paid for milling this particular lumber.

Mr. Enersen: That was an agreement, as I recall it, between the defendants and the Gallaghers.

The Court: These parties discussed that, as I recall the testimony, when they were negotiating for the contract the Court found they ultimately entered into. As I recall, they agreed specifically on this \$3 per thousand.

Mr. Enersen: That would refer back then, I believe, your Honor, to the last clause of Finding 12, on page 6, commencing at line 10, which is the recital of the agreement of the parties.

The Court: Yes.

Mr. Enersen: And it is there stated that the defendants privately owned Aztec timber, would have been manufactured under the terms and at the prices specified in that Exhibit 5 milling agreement.

The Court: That is correct.

Mr. Enersen: That would be the derivation of the \$3 figure since there was a \$3 profit item mentioned in that contract.

The Court: That is correct.

Mr. Enersen: Very well. Now, your Honor, I would like to proceed to the calculation in the Finding 19F on page 10. And I would like to comment first upon the \$3 figure which has been used with respect to the Duke City-Aztec.

It apparently has been the Court's assumption with respect to that contract that the \$3 profit figure mentioned in the contract—and that, if your Honor please, is Plaintiffs' Exhibit 5—that that was net profit. It is not described in the agreement as being either net or gross, it simply says \$3 profit. But I call your Honor's attention to supplement No. 3 to that contract, which is also in evidence as part of Exhibit 5, which modifies the arrangement between the defendants and the Gallaghers with respect to payment. The original arrangement as set forth in the basic document was that the defendants would pay the Gallaghers on a monthly basis for all milling, cutting and processing which had been done during the monthly period.

Mr. Romley: May I inquire as to the date of the contract you are referring to?

Mr. Enersen: August 9, 1957, your Exhibit No. 5, I believe.

The contract itself, it is a page and a fraction, letter agreement, specifies in the next to the last paragraph of the first page a procedure for monthly billing and monthly payment for all services performed. That is the same agreement where the \$3 net profit figure appears in the third paragraph on the first page.

Now the amendment, also dated August 9, 1957, and designated "Supplement No. 3," changes the billing procedure completely. Without bothering your Honor to read the agreement, I may summarize the revised arrangement by saying that under the revised arrangement payment was to be made upon shipment, so that the Gallaghers would receive no funds from the defendants for any of the cutting costs, for hauling the logs out of the woods or for milling the logs into lumber or for the care of the processed lumber until the lumber was actually shipped. This of course might be a period of months. At that time payment would be made and there was a specific provision in this amendment relating to the fact that this required the Gallaghers to carry inventory for the defendants, that is, to pay the costs of bringing the timber into the form of manufactured lumber and financing that entire operation until the date of shipment; and it would be only after shipment that payment would be made. This obviously would represent a financing charge. There was no place where that could be absorbed in the agreement except out of gross profit, to divert gross into net. The record also contains, if your Honor please, an estimate as to what that might represent in terms of dollars. In Defendants' Exhibit P, which is a computation of an adjustment of certain figures shown in certain exhibits of the plaintiffs, there is on page 2 an estimate that the average inventory carrying cost would be \$150,000.

This is Item 2B, on page 2 of Defendants' Exhibit P. And since the inventory under this arrangement would have to be carried for about three and a third years, that is computed in this exhibit at six per cent to represent an inventory carrying cost of \$30,000. That is to say, the cost to the Gallaghers of handling this work and carrying the inventory and the cost of carrying the inventory, should, we submit, be deducted from the \$3 figure in computing net profit. We think it is obviously a cost of performing the contract and there is no other source from which it could be obtained.

Coming back then, if I may, to Finding 19F, which is the schedule, I submit that there should be an adjustment of the net profit presumed to be obtained on the processing of the Duke City-Aztec by deducting the sum of \$30,000 from the total amount of the profit which the Court has found would be derived from that operation. The Court's finding on that score is \$75,994, and we believe that a \$30,000 adjustment should be made to that figure.

Still talking, if I may, about the \$3 rate of profit, I fail to find in the Court's statement about this particular portion of the profit computation any allowance for risk or hazard. It is perfectly clear there was no allowance for risk and hazard in the contract between the Gallaghers and the defendants; and the Court's statement has been that the Court has taken the \$3 net profit figure contained in that agreement and has used it in comput-

ing the presumed profits to be derived in future years in processing of timber which was subject to that agreement.

We have submitted, your Honor, the affidavit of a Mr. Wallen, who is the timber and lumber industry analyst and expert, and he has stated in very clear terms the necessity for taking into account risk and hazard in determining the value of a forest industry operation, by use of a formula which relates to anticipated future profits. And his affidavit states that the customary rate in the industry for risk and hazard is from six to twelve per cent. And he has pointed out that this is in addition to the discount for pure interest.

The Court: Mr. Enersen, on that point, how do I get to consider that? Here, this is testimony, virtually, that is offered by affidavit without opportunity to cross examine or anything. I don't believe I can accept that on a motion to amend findings or for a new trial. I think if that testimony were to be submitted it should have been submitted on the trial.

Mr. Enersen: Your Honor, I agree that many of the considerations involved in computing anticipated future profits have been fully developed in the record. My point, is your Honor, that the computation which the Court has provided, pursuant to the Court hearing of June 12th, is the first time we have had an opportunity to focus attention specifically upon this type of formula for the computation of present value, and the affidavit relates ex-

pressly to the Court's own computation in Finding 19F, and this is the first time that has been available to us.

The Court: Of course the case was on trial for a long time and the defendant undertook to have testimony as to all elements of the matter of depreciation, cost of capital, the presentation was made that the figures the plaintiffs were supplying were based on optimum conditions, and so forth and so on. This as now offered would have been proper testimony, but I don't see how I can consider it on a motion to amend findings or a motion for new trial. It is simply testimony by way of affidavit which couldn't be considered—unless counsel want to stipulate that I may.

Mr. Romley: We most assuredly couldn't stipulate, your Honor.

The Court: Unless that were done I could not take the affidavit as testimony.

Mr. Enersen: Very well, your Honor, we will take that as your ruling.

I would like to proceed to discuss Schedule 19F as a matter of argument.

The Court: Very well.

Mr. Enersen: The Court has stated this morning in the figure of \$4.71 per thousand an account was taken of risk and hazard of the industry in which we are involved. I fail to find any account taken for risk and hazard in the \$3 figure. I believe this is an error in computation so far as the Duke City-Aztec timber is concerned. The point I wish to

make about it so it will be perfectly clear is that the Court has taken the \$3 figure from the contract, that is the contract between the Gallaghers and the defendants, and that contract obviously being a contract between two operating concerns, contains no factors for risk and hazard whatsoever. As I said, there should be a \$30,000 deduction for cost of performance, but apart from that, whatever net figure is determined on the basis of the \$3 allowance should be subject to a further adjustment for risk and hazard. As the Court has said, an adjustment has been included in the 4.71 for the other part of the timber.

Now the Court has allowed a discount of four per cent, and four per cent I submit is nothing but pure interest. It is the type of discount which would be used in computing the present value of Government bonds, calling for interest at future dates. It is also the kind of a discount which would be used in computing the present value of any future payments which are reasonably secure, either secured by security, such as a mortgage or deed of trust, or secured by the covenant of a responsible party, as would be the case in discounting to present value the future payments under a salary contract, where there is a suit for breach of contract of employment and the employer is a solvent, responsible concern, so there is no risk or hazard as to the possibility of the payments being made when due.

The Court has, however, seen fit to apply the discount of simply four per cent, which is pure interest, and I submit that in determining the present value of the \$3 payments it is necessary for this court to apply a further discount for risk and hazard; and I submit that on that score the computation set forth in Finding 19F requires correction.

We had hoped the affidavit would supply the Court a basis for making the correction, but the Court is not willing to accept it, then it appears that a new trial will be necessary so appropriate testimony can be given as to how to make a proper adjustment of this kind of computation, with respect to this particular factor.

Now, if I may proceed then to go on to discuss the computation with respect to certain other features; and in doing so I shall use the figure set forth in the Court's computation, because those are the only figures we have available. I do not wish to be understood in using those figures to be conceding or passing by any of the points I have made. These are cumulative.

The last column of 19F is headed "Present Value of 50 Per Cent of Projected Profit." And at the foot of that column the 416,000 odd dollars therefore represents the Court's computation of the present value of one-half of the net profit presumed to be obtained from the operation for this period of time. We do not challenge the basic

method which the Court has used in computing present value, except for the correction which I have said should be made, and other corrections which we believe ought to be made, but upon which the Court has indicated it will not hear argument, based on our affidavit.

The question I am now going to discuss is what treatment [12] should be given to the \$416,000, taking that as the Court's computation of the present value of profits which the plaintiffs could reasonably expect to make from this operation for a 15-year period. This appears to be, this \$416,000 appears to be the Court's determination of the present value of the contract, the present value in 1958 of plaintiffs' contract, which the Court has concluded was violated. The value, in other words, of a fifty per cent interest in the Gallagher properties.

Now, from this point on the Court can take one of two courses, neither of which appears in the Court's computation. If this is the present value of the profits of the business and the Court applies the rule of damages indicated at the June 12 hearing, relating to a breach of a contract, to enter into a going business, then I submit that the \$416,000 should be adjusted to take account of the cost of performance on the part of the plaintiffs, so as to determine the net damage suffered by the plaintiffs in not being allowed to acquire the right to receive the \$416,000. The only adjustment the Court has made in this figure is deduction for a certain interest charge of \$48,000. This is the

Court's computation of one-half of the interest which would be due the Gallaghers under the Duke City-Gallagher contract. The Court has not, however, made any allowance for the cost to the plaintiffs of performing this contract, the cost to the [13] plaintiff of getting the right to receive the \$416,000, except for this one interest charge. How could the plaintiff have acquired this \$416,000 under the contract. The plaintiff would have been required to invest——

The Court: Is it your understanding I didn't deduct depreciation, which covers the cost of acquiring the plant?

Mr. Enersen: No, your Honor.

The Court: Well, I certainly did.

Mr. Enersen: I do not contend you failed to deduct depreciation.

The Court: Well, the cost of the acquisition is covered in the depreciation.

Mr. Enersen: This, I believe, is an erroneous assumption on the part of the Court. It is true that after a person makes an investment in a business, has his capital tied up in a business, he can through depreciation over a period of time recover, piecemeal, the amount of the investment, assuming that the profits are sufficient to pay the depreciation and the cash position of the business is such that the depreciation can be withdrawn from the business and paid to the proprietor. But in order to get the depreciation the investor must put the money into the business in the first place.

The Court: If he puts the money in and you charge it out by way of depreciation, if you are to charge him for the [14] investment and depreciation you take it twice. It is only invested once, and when you take it out by way of depreciation you have liquidated your investment, charged it to depreciation.

Mr. Enersen: I don't contend there is any right to a double deduction, your Honor. Let's take depreciation allowance for the 15th year, assuming this is a 15-year program, and the depreciation schedule is set up on a 15-year basis, which the Court has assumed, there will be in the 15th year a payment back to the plaintiff, under the Court's assumption, of one-fifteenth of the original investment. But that one-fifteenth of the original investment will be invested in the business in cash and at risk for 14 years, and there is no allowance in the Court's computation for the earning power which that part of the investment would have if it were not invested in this business. If the plaintiff were to have acquired the right to receive this \$416,000, the plaintiff would have had to put up 325,000 as her share of the purchase price, which admittedly she would eventually get back, under the Court's assumption, through annual depreciation allowances; but one-fifteenth would be invested for 14 years, one-thirteenth—one-fifteenth for 13 years, another one-fifteenth for 12 years, and of course so on down the line. And the earning power

of that investment had to come out of the plaintiff's resources. If the plaintiff had \$325,000 in [15] a savings account and had to take it out of the savings account to put it in this business, then of course the plaintiff was going to lose the savings account interest, and in return she would get this profit which the Court has computed. On the other hand, if the plaintiff were required to borrow the money it would be necessary for the plaintiff to pay interest to somebody or other, and that interest charge would be a cost of the investment to the plaintiff. I submit the computation of the Court therefore has stopped short of a complete process in determining the net damage to the plaintiff, failing to be allowed to acquire the \$416,000, under the discounted net profits formula which the Court has adopted. In addition to the 325,000, which was the contract purchase price, the plaintiff would have been required to put up her share of the working capital and the Court has found she obligated herself to do so. The record shows that working capital for this enterprise would be in the order of \$700,000, and her half of the working capital would be \$350,000. That 350,000 was not coming out by way of depreciation, your Honor, it is recovered only when the business is liquidated. Working capital is constantly needed, as the testimony shows, and therefore in addition to the 325 which she would get back through depreciation, the plaintiff would have been required to find and invest \$350,000, which would remain in

the business for 15 years. [16] And this same computation needs to be made with regard to that particular part of the investment in the business. The interest charge which the Court has deducted, \$48,000 interest charge, almost implies that there should be a deduction of the investment, because that is a part of the contract price paid to the Gallaghers; and the Court has deducted the interest but failed to deduct the capital.

The Court: The difficulty is, Mr. Enersen, you are assuming that 4.71 figure that I used was without the deduction of all these items, and it is after deduction, it is a net profit I have used there. And your assumption is, and I don't blame you for making it, because perhaps it hasn't been spelled out, but all these matters were argued, they were testified to, exhibits put in about them, and I considered those in reaching the \$4.71. I believe the Nagels were up as high as \$8 on their calculation, after depreciation. And of course the figures on the other side were down to very much below what I ultimately came up with. But all these things were considered in reaching the \$4.71 figure.

Mr. Enersen: The Court considered the loss of interest on the investments that the funds might have been——

The Court: No, I didn't, because I don't believe that is sound in this particular instance; but I mean the cost of getting the gross figure which has to be deducted [17] from the gross figure to get the net. The assumption that they would bor-

row \$325,000 and pay interest on it, I did not, because I don't think that is this particular case.

Mr. Enersen: That wasn't included in the 4.71?

The Court: No.

Mr. Enersen: I don't suppose any allowance has been made for the cost of acquiring the funds needed to put up the working capital?

The Court: That was taken into account, as well as I could calculate it.

Mr. Enersen: Interest charges on the working capital?

The Court: Yes, as nearly as I could compute it. Necessarily, not having any knowledge myself of these things, I was driven to considering the testimony of the people on both sides and accepting the figures and making the deductions that I thought sound.

Mr. Enersen: In looking at the 4.71, your Honor, and doing some computation in regard to it, we notice that it represents exactly splitting the difference between the assumed net profit, according to testimony supplied by the two parties.

The Court: It wasn't arrived at that way, and I don't know that that is true.

Mr. Enersen: You have before you a computation by the defendants showing a net profit of \$1.41 per thousand, [18] and a computation by the plaintiffs showing a net profit of \$8.01, as your Honor just said. Those two added together make the sum of \$9.42, half of which is \$4.71.

The Court: \$9 and what?

Mr. Enersen: 42 cents.

The Court: It wasn't calculated that way.

Mr. Enersen: This was accidental, I take it?

The Court: It certainly is, and I don't know, in the first place—I am accepting your statement what the figures are in the respective exhibits, but that is not the way it was calculated.

Mr. Enersen: I can give your Honor the references——

The Court: Would you do that?

Mr. Enersen: ——to the exhibits in a moment. I will ask Mr. Pfister to find them for me.

I would like to proceed to a different type of discussion of this \$416,000, your Honor. As we all know, this was a contract for acquisition of a fifty per cent interest in a piece of property. It was also property that happened to be operated for a profit in a business. The ordinary rule for the computation of damages for breach of a contract to sell property, as we all know, is the value of the bargain, how much was the property worth, how much was it going to cost if it were purchased under the contract, and the damages of course are the difference. Therefore, it would be perfectly [19] appropriate in coming to an analysis of damages from this point of view for the Court to go through the type of computation which is set forth in Finding 19F and arrive at a figure representing the value of the business, the present value of the business, based upon discounted anticipated future profits. This we agree is a customary

and proper method of evaluating a forestry business such as this. We don't agree with the Court's application of that formula, as we have said, we think the 416,000 requires a substantial adjustment to be a correct statement of present value, but passing that, the point I wish to make is that it would be proper for the Court to go through this type computation to arrive at a figure representing the value of the business, which was the subject of the contract. And the \$416,000 could be used as a representation of the value of a one-half interest in the Gallagher properties in the fall of 1958. I believe, your Honor, that is exactly what the Court has done. Although talking about discounting profits of a business, I believe what the Court has done is to use a customary method of evaluating the business and has found \$416,000 as being the present value in October, 1958.

If that is the case, the second step in the process of computing net damages of course is to deduct plaintiff's cost of performance. In this respect again, the Court has gone part way, by deducting the interest charge which the [20] plaintiff would be required to pay to the Gallaghers, but the plaintiffs also obligated, if it had carried out the contract, to pay \$325,000, being one-half of the purchase price. I submit therefore there should be a deduction of 325,000 from either the 416 or the 367, depending upon whether the interest should also be deducted.

Where does this lead. This would lead to a conclusion that the business, which was the subject of this contract, was worth, in October, 1958, twice 416,000, or \$832,000; and that plaintiffs' interest in the business of course was worth 416,000. Let us suppose, your Honor, that I am the owner of a piece of real estate and have agreed to sell it to my friend for a price of \$325,000, and my friend asks me to perform my contract and I refuse, and my friend sues me for a breach of contract; and comes in with creditable testimony that the property was worth \$416,000 at the date of the breach, and the suit against me for damages, instead of specific performance, would of course produce the judgment on those facts equal to the difference between what the property was worth and what my friend would have had to pay me if I had fulfilled my contract, the difference of course being \$91,000. Your Honor, I submit this is exactly that case. The plaintiff, according to this testimony, was entitled under the contract to receive something worth 416,000. And in order to receive it. the plaintiff, under [21] the contract, would have been obligated to pay the defendants \$325,000. If the finding is allowed to stand as it is, your Honor, the result will be that the Court will have transferred to the plaintiffs one-half of the value of the business, whether we talk about it as discounted future profits or as present real estate value, the Court will have transferred one-half of the value of the business to the plaintiffs and de-

defendants will have paid for all of the business. The defendants will be out \$650,000 for their \$416,000 half, and the plaintiffs will be out nothing for their \$416,000 half.

I call your Honor's attention to the Court's finding as to the contract, top of page 6, in finding 12A. The contract is there described as an option to purchase an undivided half interest in the Gallagher property by paying to the defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher property, payable in the manner provided for in the defendants' agreement to purchase.

I call your Honor's attention to the finding as to the breach of the contract, which the Court has found, top of page 8, it is recited: That the plaintiffs elected to exercise their option to purchase a half interest, and offered to pay one-half of the purchase price.

Then the Court finds in Finding 17 that the defendants [22] refused to carry out that contract.

So that breach which the Court has found was the breach of a contract whereby the plaintiffs could have acquired their half interest and would have paid half the purchase price.

In closing I should like to call the Court's attention again to the fact that the only testimony in the record as to the value of this property is the plaintiffs' testimony that it was worth \$500,000 at the time of the breach of the contract. There is also evidence in the record that the Gallaghers had

offered the property for sale shortly before that time at \$500,000. We know of course that the defendants paid \$650,000 for it. The Court has now found, according to my interpretation of the finding, that the property was worth \$832,000 in October, 1958. I submit, your Honor, that in the judgment for the breach of the agreement the only amount which the plaintiffs are entitled to receive is the difference between the value of the half interest, or \$416,000, according to the Court's finding, and the cost of a half interest, which was 325,000, making a net of \$91,000.

I shall reserve my comments on the plaintiffs' motions until I hear from the plaintiffs.

Mr. Romley: If the Court please, I think perhaps the only matter to which I should now address myself relates to the argument made here that the Court should have reduced [23] in its final computation the award of \$3 per thousand board feet for the so-called Duke City-Aztec, on account of risk and hazard, and also on account of an item counsel has referred to this morning as the carrying cost on that item, which he seeks to reduce to the extent of \$30,000.

It would appear, if the Court pleases, that counsel has overlooked the fact that these items about which he complains, and says should be further reduced, in fact were taken into consideration by Gallagher and by the defendants when they entered into their contract of August 9, 1957, in that

there is provided therein an item of \$75,000, I am sure the Court will recall, that was denominated G and A, general and administrative expense. Out of that one item alone many factors, many items were to compensate the Gallagher company for that loss. This \$75,000 I submit, if the Court pleases, encompasses everything that has been raised here in the way of carrying cost or risk and hazard that can be paid under that contract.

Now, I do believe, if the Court pleases, that very little if anything new has been said this morning over what appears in the lengthy briefs that have been submitted and analyzed and answered and considered by the Court. The supposition made by counsel of the ownership of a piece of real estate I think has absolutely no application here, because it was not just the purchase of a parcel of real [24] estate, it was the purchase of a going business, with the knowledge and intention of all parties that that business would be operated as a business and would be operated at a profit as the parties contemplated. That brings us squarely to the Martin versus La Fon case. And just by way of analogy, let us assume that I undertake to buy a grocery store or a chain of grocery stores, and the real property and the groceries, the tangible personal property, is a total of \$650,000, and if I grant Mr. Enersen an option to purchase that he can hold me for any damages he sustains, not say it is worth only \$650,000, and therefore since

you had to pay half of that there is no loss to me, but he can well argue that the profit at which that business would be operated is what he has lost as the result of my breach, and accordingly can hold me liable in damages.

As I say, I don't think there is anything new that has been added here and I won't, unless the Court feels he wants me to point to specific points, we will submit it on what we have said.

The Court: Did you want to respond to that before he takes up his motion?

Mr. Enersen: I should like to, your Honor.

The contract between the Gallaghers and the defendants does provide, as Mr. Romley has correctly stated, for annual payment of \$75,000 in addition to the other payments. And [25] is described in the contract, which is Exhibit 5, for general and administrative overhead expenses, not including foreman or superintendents. Whatever was contemplated as having been covered by the \$75,000, and we don't know, it is clear that it could not have covered the results of the amendment of the agreement by which the Gallaghers were obligated to carry the inventory until date of shipment. My only point, your Honor, by reason of that amendment, an additional cost of performance was imposed upon the Gallaghers and our evidence in the case that that cost was in the order of \$30,000. That could not have been contemplated in the \$75,000 annual charge because it wasn't included in the original contract.

As far as risk and hazard is concerned, of course everybody entering into a contract calling for performance in the future will do his best to take into account all the risks that are involved in carrying out the contract. And I assume, as Mr. Romley says, the Gallaghers and the defendants here both had in mind certain risks and hazards which might be encountered in their carrying out that contract as between themselves. The risk and hazard I am talking about is an entirely different matter. The Court has assumed that some 50-odd thousand million feet of timber would be processed in the Gallagher mill after the Gallagher mill was acquired by the plaintiffs and defendants under the Court's finding, and that they had agreed this timber would be [26] processed in accordance with the same terms and at the same prices as set forth in the Gallagher contract with the defendants, which was the \$3 profit figure. The risk and hazard that is involved in assuming that that timber will be available so that the plaintiff will be entitled to her \$3 profit figure, is an entirely different risk and entirely different hazard than any that could be contemplated between the Gallaghers and the defendants. If the timber should burn down, that timber would never go through the mill, Mrs. Nagel and the other plaintiffs would never receive the \$3 payment. If the mill itself should burn down it couldn't be processed through that mill, and again the \$3 would never be earned. The

only risk and hazard the defendants and the Gallaghers took account of was the risk in performing the contract if the timber were available. But in applying that profit figure in an assumed volume of timber processing, under the Court's contract between the defendants and plaintiffs, the Court must take into account the additional hazard that the timber may never be there and that the \$3 may never be earned.

Coming back to Mr. Romley's grocery store. Mr. Romley undertakes to take this case completely out of the ordinary contract for sale of real estate by assuming it is a growing business and some other measure of damages applicable. The damages he expresses, I believe, was whatever the purchaser [27] in his illustration might have lost, however it is computed. And we then look at the \$416,000 as the Court's assumption of the profits which would have been derived by the plaintiff from her half of this going business. And of course the application of the rule of *Martin versus La Fon* is what Mr. Romley seeks to use in this case. But even in cases where discounted future profits are the measure of damage, the Rule is consistently that the cost to the plaintiff of performing the contract should be deducted from the profits which he anticipates would be received. We have cited two cases in our brief on that very point, one of them being a 1932 Arizona case, in which there was a breach of a contract to do certain hauling. And it appears they contemplated a certain number of trips—

The Court: That is Bradbury versus Matson?

Mr. Enersen: Yes, your Honor.

The Court: I remember the case.

Mr. Enersen: Your Honor will recall that the cost of performing the trips was deducted from the profits to be obtained. The other, the theater case, I assume the Court is familiar with that, the Tenth Circuit case, Loew's, Incorporated, against Cinema Amusement—

The Court: The reason I say I remember the Bradbury against Matson, I happened to be there during part of the trial when Judge Jenckes tried it. It is a very short case [28] by way of testimony and ended up in the Supreme Court with the Rule that you are urging here.

Mr. Enersen: And I think it's still the rule in Arizona. The theater case, to the same effect, when computing the damage resulting from a breach of a contract for future profits, the cost of obtaining those profits must be deducted. And the restatement, which we cited, is precisely to the same effect, that if any saving is accomplished by breach of the contract that saving must be deducted from the damages.

I am willing to submit this part, your Honor.

The Court: Mr. Romley, you have your motion?

Mr. Romley: My motion, yes.

The motion made here by the plaintiff and filed after the motion of the defendants was filed, seeks to have the judgment amended and the findings amended in such manner as to allow a recovery at the rate of \$3 per thousand board feet for 21,-

217,000 board feet of so-called Duke City-Aztec, and also seeks to have a similar amendment to discount to present worth only those sums that will accrue after January 1 of this year. We think it should be after this date, but giving the defendants the benefit of the doubt because of the statement in evidence, we feel that should be discounted as to those that come forward in the future.

With regard to the first motion, if your Honor please, I know there was a lot of testimony in the record with [29] respect to what was owed or what wasn't owed, and whether in fact it was owed, in the way of Duke City-Aztec, as the result of their so-called pooling agreement between the Gallaghers and the defendants. The Court has found that it was not owed by Duke City to the Gallaghers and we do not quarrel with that finding. The fact remains, however, and we submit to the Court from the evidence that it is clear that is the situation, that that amount of timber is still standing in the forest. It was never cut down in September of 1958 or in October or November, 1958, when the contract was finally signed, and was still available to be milled. I think that is pointed out in Exhibit 13, where the one that shows the available timber by years. Under the position we took at the trial and in our briefs, were we correct, we would have been entitled to recover \$4.71 under the Court's finding, on the 21,000,000 feet. We concede it should be reduced to the 3 dollars, because

it falls in a different category and it is not Forest Service timber or Aztec timber and is Duke City timber, for which we should be allowed to participate to the extent of one-half of the profits on the 21,217,000 board feet, and I do believe upon further consideration the Court will recognize from that exhibit and from all the testimony in the trial that that is timber still in the forest, in the various categories we showed. We showed a number of board feet in Duke City-Aztec, [30] Gallagher-Aztec and the Forest Service-Aztec, existing and also the amount of future timber in the way of Forest Service contract to be awarded on May 31st, 1960, and under future Forest Service contracts. We think that allowance would be proper.

As to the matter of present worth. The only reason for the rule which requires a party who is entitled to recover damages, either for tort or for breach of contract, to discount the money received to its present value is based upon the sound proposition that if I am entitled to receive money over a period of 15 years and I receive it now, or adjudged by the Court entitled to receive it now, that to the extent I receive it in advance of the time I would otherwise have received it, I am getting a benefit unless I discount it to present value. That applies in this case, if your Honor pleases, as to only 13 of the 15 years, because, as a matter of fact, two and a half years are already behind us. And in discounting its present value the Court

discounted it for the entire period of 15 years. That is why we presented all of these exhibits at the trial; we presented one exhibit showing what it would be discounted to on the basis of one year after the date of the trial. We overlooked at that time pointing out to the Court that one year had already expired. As to that one year behind us, as of the date of the trial, it should not have been discounted. But [31] upon further reflection and consideration, and recognizing the Rule we have mentioned, we believe that we are sound in asserting that it should be discounted only as to the 12 and a half—I say giving the defendants the benefit of the doubt as to the years, 12 and a half or 13 years to accrue in the future.

I find one statement here in the Restatement of Law of Torts, Section 924, Comment D on page 635. It doesn't say exactly what I am stating now to the Court, but the reasoning there indicates the argument we are making is sound, and I quote: "In ascertaining the present worth of the future loss of earnings, that is, in discounting the recovery because future losses are paid for in advance, the rate of discount is based upon the current return upon long term investments if the prospective losses are long continued." We say here that the reason for discounting it is because they are paid for in advance. As to the two years behind us, there is no payment by the defendants in advance after recovery on these judgments, that is

money we would have earned in the year 1959 and in the year 1960, and would have had in our pocket, and additionally add six months to this year.

Another statement to which I wish to direct your Honor's attention is the case of Fuller versus Royal Casualty Company, Supreme Court of Missouri, reported in 196 SW, at page 755, a breach of contract case, reading from page 763, [32] syllabus 6 there: "The further point is made that since the damages for which the judgment was rendered was composed of monthly installments due and not due at the date of its rendition, the trial court erred in not finding the then present worth of those sums not due, according to the life tables, and in not rendering judgment for only the aggregate of the installments then due with interest thereon, and the then present worth of those installments not then due. In other words, I understand counsel to contend that the trial court should have deducted from each monthly installment not due at the date of the judgment a percentage equal to six per cent per annum from that date until due, according to the contract, and then have rendered judgment for an amount equal to the installments then due with interest, plus those not then due, less said six per cent deduction. That contention of counsel, in my opinion, is well founded. It is based upon sound reason and common justice. While it deducts six per cent per annum from the monthly installments not due him

at the date of the rendition of judgment, yet it gives him those portions of his salary before due from one month to many before he could have collected them had the contract not been broken, and had he worked all that time.”

I think we might analogize this situation to one that might, if I were injured as a result of an automobile collision and two years elapsed from the date of my injury to the date of the trial, and I sustained a loss of earnings, [33] let's say \$30,000 a year for those two years, and the evidence would support a finding by the court or jury that I am permanently injured and my life expectancy is 20 years and I would receive in the future for an additional 20 years \$20,000 per year. Certainly the Court should discount the money that I would earn, that I would have earned and received over the ensuing 20 years, following the date of trial, to its present worth, because I am being awarded that amount of money. But there is no sound or logical reasoning, if the Court pleases, to discount the two years' earnings for \$40,000 I would have earned from the date of my injury to the date of trial, during which time I was completely disabled. I think it is perfectly logical and we submit that the judgment and finding should be amended accordingly. I did not know whether the Court would feel that any modification or amendment or change in the findings and judgment should be made, or if one is made whether it should be made after the first year, or if made, whether it should be

made after the second year. So I contended, and supported by affidavit, the various tables which I did. The one that we contend for here is that the reduction of present value should be made after January, 1961, because 1959 and '60 had already accrued. Had we been allowed interest from the day of the breach, which is a matter we presented earlier, this point would not be sound, but not having been allowed [34] interest from that date that we should not be discounted further.

Mr. Enersen: If the Court please, I have the record references to those two profit computations which I mentioned in my opening statement. Plaintiffs' Exhibit 12 shows a computation which ends at the bottom of the right-hand column with a heading entitled "Projected Profit After Depreciation, \$8.01 Per Thousand." Plaintiffs' Exhibit 12.

The Court: What is the other one?

Mr. Enersen: Defendants' Exhibit Q, your Honor.

The Court: Q?

Mr. Enersen: Q. It was entitled, "An Analysis of Computations and Adjustments Shown on Plaintiffs' Exhibit 12."

The Court: I have it.

Mr. Enersen: The next to the last line at the bottom of the right-hand column is entitled, "Profit Per Thousand \$1.41."

As I said earlier, the sum of those two figures divided by two equals \$4.71.

Now, your Honor, if I may address myself to the plaintiffs' two motions.

The Court: Proceed.

Mr. Enersen: The first motion relates to a quantity of timber which the Court has found should not be included in the volume of timber to be processed through the Gallagher [35] mill, upon the assumption that the plaintiffs and the defendants had acquired the mill jointly and operated it together. This point, your Honor, places me in a very unfortunate position. I don't say it is difficult, but it is unfortunate. I do not agree with the Court's computation, as I have said, and I believe it is incomplete in a number of respects. But I am bound to say to your Honor that I believe the theory which the Court has applied and with which, as I say, I do not agree, is inconsistent with the exclusion of the 21,000,000 feet. I do not have anything to add to that except to say that it then presents a question whether there is 71,000,000 feet available in the Duke City-Aztec property. At the time of the trial none of that timber had been cut, so there was no evidence before the Court as to how much timber was actually available, based upon the experience, which of course is the only real test of cutting and milling. Since the trial there has been substantial cutting of that Duke City-Aztec, and upon a new trial it would be possible to present evidence based upon actual experience as to whether, and if so, to what extent, there might be a deficiency in the 71,000,000 feet, which must be found in that Duke City-Aztec if that total amount is to be included in the volume

processed through this mill under the Court's theory. At the time of the trial there was evidence, based upon estimates and of course upon computations, from which [36] the Court may have concluded that that timber was not available. And if that is the basis of the Court's exclusion of the 21,000,000 feet, I of course agree. However, one of the reasons we think a new trial as to damages would be advisable would be for the Court to have before it evidence of actual experience in the milling and cutting of this Duke City timber, which of course is a very important part of the damages that have been computed by your Honor.

With respect to counsel's second point, it is to my mind just another method of trying to get interest from the date of the breach. When counsel submitted his proposed findings in the first instance he undertook to obtain interest from the date of the trial. At the hearing on June 12th in Tucson when the Court pointed out that was not proper, counsel undertook to obtain interest from December, 1960, which was the date when your Honor announced his conclusion, and your Honor, in my opinion, quite correctly held this being a contract case and the contract rule being interest is allowed from date of judgment in a case of a trial by the Court, the Court determined that interest would be allowed from the date of judgment. And with that of course we thoroughly agreed. Now the plaintiff is making an effort to get interest, not from the

date of trial, but from the date of breach. All this computation about whether you discount it or don't discount it for the first [37] two years is just another method of obtaining interest for that period of time. His citations all relate to tort cases, or as I understood that Southwest case, it sounded like a case where there was a contract for the payment of a liquidated sum of money over a period of time, as for example, a contract of employment. The reference to the restatement was of course a reference to the Tort Rule.

We submit, your Honor, that in this case we have a contract case, a breach of contract for the sale of property, according to the Court's finding, and the only purpose for which future profits are considered is to determine the value of the contract to the plaintiff at the time of the breach. And this is a step in the process of determining the amount of damage suffered at the time of the breach. We submit therefore that there is no basis whatever for allowing interest from that date.

In closing, your Honor, I should like to summarize by saying that if the Court's award is allowed to stand the result will be this: For her half of the interest in this business the plaintiff will be entitled to \$416,000 without a penny of cost to herself. For his half of these profits the defendant will be entitled to \$416,000 at a cost of \$650,000. And I submit, your Honor, the damages on that basis are grossly excessive.

Mr. Romley: I heard no answer to the reasoning and [38] logic of amending the findings and judgment so as to allow a discounting to present worth of only the years in the future and not the years behind us. True, counsel says that is a means of recovering or seeking to recover interest from the time of the breach. It is not exactly correct to say that. We are saying that the evidence shows we have sustained damages in the amount shown in 19F, in 1959 of 58 or \$59,000, and in 1960 of a different figure. Of those sums of money, but for the defendants' breach, we would now have the 1962 and '3 and '4 and so on, that we have *no* received we should reduce to present value. As I say, there has been no answer.

With respect to the item on the additional 21,217,000 feet, and as to availability, that was timber under contract, Aztec timber actually under contract. It was there, it was available, there was no evidence in the record to the contrary, and we submit as to that we are entitled to the profit on one-half of that timber. It is an item of about \$31,000 in round figures.

The Court: In your presentation of it that 21,000,000 feet was not presented in Duke City-Aztec.

Mr. Romley: I beg your pardon?

The Court: In your exhibits on the trial that was not presented in Duke City-Aztec.

Mr. Romley: That is correct, your Honor, we presented it, it is Gallagher-Aztec and we said it was owed by Duke City [39] to Gallagher. The

Court found to the contrary. But it was there in the forest, if it wasn't there as Duke City-Aztec—as Gallagher-Aztec, then it was there as Duke City-Aztec. If Duke City did not owe it to Gallagher it still remains Duke City's timber, which would have been milled the same as the other Duke City timber and on which we would have realized a profit jointly of \$3 per thousand. I confess it was not presented as Gallagher-Aztec, but the aggregate of Duke City and Gallagher-Aztec are the figures for which we now contend and they would include the 21,000,000 feet.

Mr. Enersen: If the Court please, I would like to comment briefly on that last statement. It is true there was a contract in evidence between the owner of the timber and Duke City. That contract referred to a total of 60,000,000 board feet. The 71,000,000 odd which is necessary to obtain in order to add the 21,000,000 is simply based upon some testimony of assumed over-runs. And at the time of the trial there had been no cutting of that timber. The only thing that was in evidence was the contract, which was 60,000,000 board feet, and testimony as to the possibility of over-runs. And my suggestion about this matter, your Honor, is now there has been actual cutting and it can be determined whether the 60,000,000 board foot contract will or will not supply enough timber to make up the extra 21,000,000. [40]

Mr. Romley: Your Honor, I hate to keep getting up back and forth, but if I can say this and

I would be happy to submit it. Counsel is mistaken when he says, or probably doesn't have completely in mind all of the facts relating to this Aztec timber, whether it be Duke City or Gallagher. There was in the evidence there was 60,000,000 net log scale on which there would have been an over-run of about 15 per cent, which brought it to the 71,000,000 odd feet of net lumber recovery. Your Honor will recall the evidence on that. And the 60,000,000 feet is correct, and his offer now to present evidence because of the past experience comes much as a surprise, because they could have presented the experience for all of the year 1959 and for the first four months of 1960 at the time of trial to show our computations and testimony were in error. I am sure Mr. Pfister will recall how desperately we tried to get records of their experience during that 16 months period and how they fought us and succeeded in keeping us from getting such evidence into the record.

Mr. Enersen: Your Honor, I have stated I think that there had been no cutting of this timber at the time of trial.

The Court: The matter will be submitted and I will get on it promptly.

Mr. Pfister: We have one other short matter we [41] would like to take up, your Honor, that is the method for handling the supersedeas bond in the event of appeal. We have agreed with Mr. Romley, subject to your Honor's approval, that in lieu of a supersedeas bond, to deposit the amount agreed upon, which may or may not be changed

in view of the motions which are now pending, to deposit that amount with the First National Bank of Albuquerque and obtain a certificate of deposit made payable to the Clerk of Court, to be held by the Clerk of the Court, and in the event the judgment is affirmed, or to the extent it is affirmed, the stipulation would provide that the Clerk would turn the certificate over to the plaintiff.

The Court: The only problem I have is getting the Clerk into something, unless he wants to agree to it. It is perfectly all right with me, because you gentlemen can agree on any method of supersedeas that doesn't concern me, but I don't want to speak for Mr. Loveless and say that is fine. I think he should be consulted about that, and if agreeable with him it is certainly all right with me.

Mr. Romley: Counsel approached me with this proposal, if your Honor please. It amounts to a cash supersedeas instead of a surety bond supersedeas. I can appreciate the Clerk's position and I am willing to agree with counsel that if he is unwilling to assume that responsibility perhaps we can deposit that in escrow with the Phoenix bank, [42] Phoenix Title & Trust Company, any one of the trust companies there, and they can do the same thing the Clerk is being asked to do.

The Court: I am sure you won't have any difficulty in working it out as long as you are in agreement.

Mr. Romley: May I say this, your Honor, and I am sure counsel didn't mean to be incomplete in his statement. It is not just the amount of the

judgment that will be deposited, it is that amount plus a sum we have anticipated as accruing interest from the date of the judgment and anticipated costs, that is correct?

Mr. Pfister: Certainly.

The Court: Very well. [43]

[Endorsed]: Filed August 28, 1961.

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried to the court without a jury, the court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. At the time of the commencement of this action plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins, Georgia Mae Jenkins and James Henry Nagel were citizens and residents of the State of Arizona.

2. At the time of the commencement of this action defendants Maurice Liberman, Joseph Grevey and Jack Grevey were citizens and residents of the State of New Mexico.

3. The amount in controversy exclusive of interest and costs exceeds the sum of \$10,000.00.

4. Plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins and Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, trustee for James Henry Nagel, limited partner, at all times herein mentioned were and they now are the sole members of a limited partnership existing under the laws of the State of Arizona and doing business as Nagel Lumber & Timber Company.

5. Defendants Maurice Liberman, Joseph Grevey and Jack Grevey at all times herein mentioned were and they now are the sole members of a partnership existing under the laws of the State of New Mexico and doing business as Duke City Lumber Company.

6. At all times herein mentioned plaintiffs were and they now are engaged in the operation of a business enterprise consisting of the purchase of standing timber from within the exterior boundaries of the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public.

7. On and prior to September 20, 1958, the New Mexico Timber Company, a New Mexico corporation, the Arizona Timber Company, an Arizona corporation, and the Bernalillo Lumber Company, a partnership consisting of A. I. Kaplan and T. P. Gallagher, partners, owned and engaged in the business enterprise consisting of the purchase of standing timber from within the exterior boundaries of

the Sitgreaves National Forest, the removal of said timber to a mill at Winslow, Arizona, the manufacture thereof into lumber, and the sale of said product to the public. Said corporations and partnership collectively hereinafter will be referred to as "the Gallagher Companies" and said business enterprise, together with certain physical assets, easements, leases and timber contracts appurtenant thereto, hereinafter will be referred to as the "Gallagher Properties."

8. Prior to September 23, 1958 the Gallagher business operations and the plaintiffs' business operations were substantially identical. Their timber sources, physical plants, costs of operation, quantity, quality and type of product were substantially the same.

9. For many years prior to September 20, 1958, plaintiffs and the Gallagher Companies had an agreement whereby, in the event either the plaintiffs or the Gallagher Companies offered for sale either of their respective above described business enterprises, the other party would have the right of first refusal to purchase the business enterprise so offered for sale. During 1958 and shortly prior to September 23, 1958, the Gallagher Companies did offer the Gallagher Properties for sale. Pursuant to said agreement plaintiffs and the Gallagher Companies were actively engaged in negotiations for the purchase of the Gallagher Properties.

10. On September 10, 1958 defendants commenced negotiations for the purchase of the Gallagher Properties. On that day T. P. Gallagher advised defendants that the Gallagher Companies had an existing oral reciprocal first refusal agreement with the plaintiffs and that any sale to defendants would be subject to plaintiffs' first refusal. Thereupon defendants contacted plaintiffs and arranged for a conference which was held in Winslow, Arizona, on September 20, 1958.

11. At this conference plaintiffs and defendants agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties; that defendants would then proceed to negotiate a purchase thereof; that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Properties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase; that in the event plaintiffs exercised their said option, then the business enterprise herein referred to as the Gallagher Properties thereafter would be jointly owned and operated by plaintiffs and defendants for the purpose and in the expectation of making a profit; and that defendants' privately owned Aztec timber would be manufactured by plaintiffs

and defendants in the newly-acquired mill under the terms and at the prices specified in the milling agreement received in evidence as plaintiffs' Exhibit 5.

12. On September 22, 1958, defendants prepared the document received in evidence as plaintiffs' Exhibit 3 which the parties signed on September 23, 1958 and reads as follows:

“September 23, 1958

“Mrs. George H. Nagel
Nagel Lumber & Timber Company
Winslow, Arizona

“Dear Mrs. Nagel:

“It is our understanding that you have a ‘first refusal agreement’ with Arizona Timber Company to buy out their Plant at Winslow; and, if you turn down this option it is our understanding that we are second in line to buy the Plant.

“It is now mutually agreed that in case either of us (and by this is meant, the companies controlled by the Liberman Group as one party; and the Nagel Lumber and Timber Company or any company controlled by the Nagel Family as the second party) will take-up the proposition made by Arizona Timber Company and buy out the Winslow Plant from them, then our companies will have the option to participate in that purchase on a fifty-fifty basis at the same terms as the purchaser will get from the Arizona Timber Company.

“This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.

“Very truly yours,

MAURICE LIBERMAN

Maurice Liberman

“Liberman Group

By: MAURICE LIBERMAN

Nagel Family

By: ROBERT T. JENKINS

“ML:rb”

12. (a) From the conversations and negotiations of the parties carried on at the meeting of September 20, 1958 and from the language of Exhibit 3 in evidence the plaintiffs understood at the time Exhibit 3 was executed by the parties, and the defendants then knew or had reason to know that the plaintiffs understood from such conversations and negotiations and from the language of Exhibit 3, that plaintiffs and defendants had contracted and agreed that plaintiffs would give up their aforesaid right of first refusal and withdraw from further negotiations for the purchase of the Gallagher Properties; that defendants would then proceed to negotiate a purchase thereof; that in the event defendants purchased the Gallagher Properties, then plaintiffs would have an option until April 30, 1959 to purchase from defendants an undivided one-half interest in said Gallagher Proper-

ties by paying to defendants one-half of the purchase price paid or agreed to be paid by defendants to the Gallagher Companies, payable in the manner provided for in defendants' agreement of purchase; that in the event plaintiffs exercised their said option the plaintiffs and defendants, in addition to operating the business would share equally the obligation to provide any capital necessary therefor, as well as share equally the profits and losses of the business; and that defendants' privately owned Aztec timber would be manufactured by plaintiffs and defendants in the newly acquired mill, under the terms and at the prices specified in the milling agreement received in evidence as Plaintiffs' Exhibit 5.

13. At the time of the execution of Exhibit 3 by plaintiffs and defendants the business enterprise herein referred to as the Gallagher Properties was a going business earning and capable of earning substantial profits, which plaintiffs and defendants contemplated said business would continue to earn in the future.

14. On September 23, 1958, plaintiffs released the Gallagher Companies from their first refusal agreement and withdrew from further negotiations with the Gallagher Companies for the purchase of the Gallagher Properties.

14. (a) Following protracted negotiations in New York between defendant Maurice Liberman and the owners of the Gallagher Properties an

agreement for sale of said Properties was reached on October 16, 1958 at about 2:00 A.M. subject to final approval by both buyers and sellers at 11:00 A.M.

14. (b) In the early morning hours of October 16, 1958 plaintiff Mabel J. Nagel received a phone call in Winslow from defendant Liberman in New York. He requested that plaintiffs release defendants from the option agreement and send him a telegram to that effect as soon as possible. She replied that she did not think she would do that but would check with plaintiff Robert T. Jenkins, and she did. At 8:29 A.M. Mrs. Nagel sent Liberman a telegram stating "Do not wish to release options at this time."

14. (c) In a later phone call on October 16, 1958, Liberman told Mrs. Nagel the price of the plant and timber but did not reveal that the terms were credit rather than cash. He acknowledged receipt of the aforesaid telegram and asked Mrs. Nagel to come to New York. She replied that she could not come. Plaintiffs did not see or hear from defendants again until mid-November, 1958.

14. (d) On October 17, 1958 a tentative draft of the purchase and sale agreement was executed by defendants and the Gallagher Companies.

15. On November 6, 1958, defendants and the Gallagher Companies entered into a written contract whereby the Gallagher Companies agreed to

and did sell and the defendants agreed to and did purchase the Gallagher Properties.

15. (a) In mid-November, 1958, Jenkins approached Liberman for the purpose of discussing defendants' purchase of the Gallagher Properties. Liberman stated that he would be in Winslow shortly and would get in touch with Jenkins but did not do so on account of illness.

15. (b) On December 23, 1958 plaintiffs asked to see the contract for the purpose of deciding whether or not to exercise their option, but defendants refused to allow them to see a copy.

16. On January 6, 1959, plaintiffs for the first time learned the terms of defendants' aforesaid purchase, and on that day they advised defendants they elected to exercise their option to purchase said undivided one-half interest in the Gallagher Properties and offered to pay one-half of the purchase price. At the time of so electing the agreement of September 20, 1958 between plaintiffs and defendants was still in full force and effect, the defendants had not been released from their obligations thereunder, and plaintiffs had done all things required of them by said agreement. Also, at the time of so electing, the plaintiffs were ready, able and willing to consummate the purchase of said one-half interest.

17. Defendants refused and ever since have refused to allow plaintiffs to exercise such option and acquire said undivided one-half interest.

18. Plaintiffs claim that defendants owed the Gallagher Companies timber (referred to in plaintiffs' Exhibit 9 as "owed by Duke City") from which there would have been a net lumber recovery of 21,217,000 board feet; and they further claim that they are entitled to share in the profits which said 21,217,000 board feet would have produced, computed on the same profit basis as the Gallagher Aztec and the Forest Service timber. The aforesaid timber was standing in the forest and there would have been a net lumber recovery therefrom to the parties of 21,217,000 board feet; it was not "owed by Duke City," but was owned by Duke City; and plaintiffs are entitled to share in the profits which it would have produced, computed on the same profit basis as the Duke City Aztec and not on the same profit basis as the Gallagher Aztec and the Forest Service timber.

19. The present value of one-half of the net profits reasonably certain to have been derived from the operation of the Gallagher Properties by plaintiffs and defendants is the sum of \$429,883.40. If the parties had gone ahead pursuant to the agreement between them:

(a) The Gallagher Properties would have been operated during the years 1959 to 1973 inclusive, at a joint profit to the parties of \$3.00 per 1,000 board feet as to the Duke City Aztec and of \$4.71 per 1,000 board feet as to the Gallagher Aztec and Forest Service timber.

(b) There would have been a net lumber recovery to the parties of 71,880,000 board feet from the Duke City Aztec, as to which the parties would have derived a profit of \$3.00 per 1,000 board feet which would have produced a joint profit to the parties of \$215,640.00; and the share of plaintiffs therein would have been one-half of that sum, or \$107,820.00.

(c) There would have been a net lumber recovery to the parties of 194,685,000 board feet from what the evidence refers to as Gallagher Aztec and Forest Service timber, as to which the parties reasonably could anticipate a profit of \$4.71 per 1,000 board feet. This would have produced a joint profit to the parties of \$916,966.35; and the share of plaintiffs therein would have been one-half of that sum, or \$458,483.18.

(d) Plaintiffs' share of the aforesaid net profits aggregates \$566,303.18; the present value of this sum at the rate of 4% is \$478,633.40.

(e) The interest which plaintiffs would have been required to pay on the purchase price amounts to \$48,750.00. The net damage, therefore, is \$429,883.40.



"(f) The damages sustained by plaintiffs are computed as follows:

" SCHEDULE SHOWING COMPUTATION BY COURT OF DAMAGES SUSTAINED BY PLAINTIFFS

	<u>PRODUCTION OF AVAILABLE TIMBER BY YEARS</u>		<u>50% OF PROJECTED PROFIT BY YEARS</u> Duke City Aztec @ \$3.00 per M All other timber @ \$4.71 per M		<u>PRESENT VALUE, @ 4% OF \$1 DUE THE YEARS WHICH PRODUCE LM ()</u>	<u>PRESENT VALUE OF 50% OF PRO- JECTED PROFIT</u>
1959	Duke City Aztec Existing Forest Service	15,320,000 14,680,000	\$ 22,980.00 34,571.40	\$ 57,551.40	1.000000 (0)	\$ 57,551.40
1960	Duke City Aztec Existing Forest Service Future Forest Service	15,000,000 7,000,000) 8,000,000)	22,500.00 35,325.00	57,825.00	1.000000 (0)	57,825.00
1961	Duke City Aztec Future Forest Service	19,830,000 10,170,000	29,745.00 23,950.35	53,695.35	.961538 (1)	51,630.12
1962	Duke City Aztec Future Forest Service	17,350,000 12,650,000	26,025.00 29,790.75	55,815.75	.924556 (2)	51,604.79
1963	Duke City Aztec Gallagher Aztec Future Forest Service	4,380,000 13,545,000) 12,075,000)	6,570.00 60,335.10	66,905.10	.888996 (3)	59,478.37
1964	Gallagher Aztec Future Forest Service	3,975,000 12,075,000		37,797.76	.854804 (4)	32,309.67
1965	Future Forest Service	12,075,000		28,436.63	.821927 (5)	23,372.83
1966	Future Forest Service	12,075,000		28,436.63	.790315 (6)	22,473.89
1967	Future Forest Service	12,075,000		28,436.63	.759918 (7)	21,609.50
1968	Future Forest Service	12,075,000		28,436.63	.730690 (8)	20,778.35
1969	Future Forest Service	10,443,000		24,593.26	.702587 (9)	17,278.00
1970	Future Forest Service	10,443,000		24,593.26	.675564 (10)	16,614.32
1971	Future Forest Service	10,443,000		24,593.26	.649581 (11)	15,975.31
1972	Future Forest Service	10,443,000		24,593.26	.624597 (12)	15,360.88
1973	Future Forest Service	10,443,000		24,593.26	.600574 (13)	14,778.97
	<u>266,565,000</u>			<u>\$566,303.18</u>		<u>\$478,633.40</u>

EXISTING TIMBER - NET LUMBER RECOVERY

<u>Duke City Aztec</u>	<u>Gallagher Aztec</u>	<u>Forest Service</u>	<u>Total</u>
15,320,000	13,975,000	14,680,000	
14,680,000	3,975,000	7,000,000	
19,830,000			
17,350,000			
4,380,000			
<u>71,880,000</u>	<u>17,520,000</u>	<u>21,680,000</u>	<u>111,080,000</u>

Total Damages Sustained by Plaintiffs
Reduced to Present Value 5478,633.40

Minus Present Value of Interest
Computed on Purchase Price 49,739.00

TOTAL NET DAMAGES Sustained by
Plaintiffs, per Judgment 5428,894.40

FUTURE TIMBER - NET LUMBER RECOVERY

Forest Service Contracts to be awarded 5/31/60 and to be cut by 5/31/62	30,820,000		
Forest Service Contracts to be awarded and to be cut in years 1963 to 1973 inclusive	<u>124,665,000</u>	<u>135,485,000</u>	
<u>TOTAL</u>		<u>266,365,000</u>	



Conclusions of Law

1. This court has jurisdiction over the parties and the subject matter of this action.

2. Plaintiffs and defendants entered into a valid, lawful contract whereby the plaintiffs were granted an option until April 30, 1959 to purchase from defendants an undivided one-half interest in the Gallagher Properties in the event of their acquisition by defendants.

3. Plaintiffs fully performed their part of said agreement and on January 6, 1959 elected to purchase from defendants said undivided one-half interest in the Gallagher Properties in accordance with the aforesaid agreement.

4. Defendants breached the aforesaid agreement between plaintiffs and defendants by refusing to allow plaintiffs to exercise their aforesaid option.

5. Plaintiffs are entitled to recover from defendants, and each of them, as damages for breach of said contract, the present value of one-half of the net profits reasonably certain to have been derived from the operation of the Gallagher Properties by plaintiffs and defendants.

6. Plaintiffs have been damaged in the sum of \$429,883.40 and are entitled to judgment against defendants, and each of them, for said sum together with interest thereon from the date of judgment until paid at the rate of 6 per cent per annum.

7. Some of the findings of fact heretofore made necessarily involve matters of both fact and law. To the extent that any finding of fact may be construed more properly as a conclusion of law, the same hereby is adopted and incorporated herein as a conclusion of law.

Let judgment be entered accordingly.

Dated this 28th day of July, 1961.

/s/ JAMES A. WALSH,
U. S. District Judge

[Endorsed]: Filed July 28, 1961.

[Title of District Court and Cause.]

MEMORANDUM RULING ON MOTIONS OF
BOTH PARTIES TO AMEND THE FIND-
INGS AND CONCLUSIONS AND TO
AMEND THE JUDGMENT, AND AN DE-
FENDANTS' MOTION FOR ADDITIONAL
FINDINGS AND MOTION FOR NEW
TRIAL AS TO DAMAGES

It will be helpful to preface the court's ruling on the motions with a statement of the derivation of the profit figures set out in Finding 19(a) of the Findings of Fact made on June 20, 1961, of \$3.00 per 1,000 board feet as to the Duke City Aztec and \$4.71 per 1,000 board feet as to the Gallagher Aztec and Forest Service timber.

As to the Duke City Aztec, the \$3.00 figure was derived from the agreement between the parties regarding defendants' privately owned Aztec timber which is set out at the conclusion of both Paragraphs Nos. 11 and 12(a) in the Findings of Fact made on June 20, 1961.

As to the \$4.71 per 1,000 board feet on the Gallagher Aztec and Forest Service timber, the court felt that the comparable operation of the Nagels during the years 1952-59 was a sound basis for estimating probable future profits of the joint operations of plaintiffs and defendants, had the contract not been breached. However, the court determined that the plaintiffs' claimed figure for profit before depreciation, that is, \$1,591,791.40. (Plaintiffs' Exhibit No. 10), was too high and made the following deductions: (a) Deducted interest paid by Nagels in the 1952-59 period in the sum of approximately \$72,000.00; (b) While some management expenses had been deducted in reaching the \$1,591,791.40 figure, it was estimated that the management expenses of plaintiffs' and defendants' operations would be probably \$5,000.00 per year higher and, accordingly, \$40,000.00 should be deducted to make the Nagel experience more nearly comparable; (c) The joint operation of plaintiffs and defendants would require working capital with the resulting interest cost thereon, and defendants' estimate of \$500,000.00 at a 6% rate would require an additional deduction of \$240,000.00 for the 8-year period covered in Plaintiffs' Exhibit No. 10.

The total of the deductions mentioned above, \$352,000.00, taken from the \$1,591,791.40 left \$1,239,791.40; and when this was divided by the Net Sales FBM of 140,956,000, the operating profit before depreciation was \$8.80 per 1,000 board feet.

The court found that the depreciation figure of \$874,928.00 arrived at in Plaintiffs' Exhibit No. 11 was sound, but since plaintiffs in Exhibit 11 spread this depreciation over a projected production of 266,565,000 feet, while the court found the total projected production to be only 245,348,000 feet, the Court could not accept plaintiffs' figure of \$3.28 per 1,000 board feet. Spreading the depreciation of \$874,928.00 over a production of 245,348,000 feet resulted in a figure of \$3.57 per 1,000 board feet.

Deducting from the anticipated profit before depreciation of \$8.80 per 1,000 board feet, the depreciation of \$3.57 per 1,000 board feet left a probable net profit of \$5.23 per 1,000 board feet. However, since the calculation being made was of future profits and there is always uncertainty and chance in the future, the court determined to reduce the probable figure by 10% or 52c. The result was a finding of a profit to plaintiffs and defendants, had the contract not been breached, of \$4.71 per 1,000 board feet on the Gallagher Aztec and Forest Service timber.

Defendants' Motions

Defendants' motion to amend Finding of Fact No. 14(b), page 7, line 7, is granted. With that exception, the motion of defendants to amend the findings of fact, to make additional findings of fact, and to amend the judgment is denied.

The motion of defendants for a new trial as to the issue of damages along, is denied.

Plaintiffs' Motions

It seems clear that the court must add to the Duke City Aztec the 21,217,000 board feet which the court found were not "owed by Duke City" to the Gallagher companies. Indeed, counsel for defendants conceded on the hearing of plaintiffs' motions that, to be consistent in applying the theory used in its decision, findings and conclusions, the court must make this addition to the Duke City Aztec.

The court feels, further, that it is not justified in reducing the future profits for the years 1959 and 1960 to present value, since the profits would have been received by plaintiffs in those years had there been no breach of the contract.

Accordingly, plaintiffs' motion to amend the findings of fact and conclusions of law and to amend the judgment is granted. Amended findings and conclusions are filed herewith and the clerk is directed to enter an amended judgment forthwith that plain-

tiffs recover from defendants the sum of \$429,883.40, with interest thereon at the rate of 6% per annum from June 20, 1961 until paid.

[Endorsed]: Filed July 28, 1961

Title of District Court and Cause

March 1961 Term

At Prescott

MINUTE ENTRY OF JULY 28, 1961
(Prescott Division)

Honorable James A. Walsh,
United States District Judge, Presiding
Civ-610 Prescott.

It Is Ordered that Defendants' Motion to Amend Finding of Fact No. 14(b), page 7, line 7, is granted, and with that exception, It Is Ordered that Motion of Defendants to Amend Findings of Fact, to Make Additional Findings of Fact, and to Amend Judgment is denied.

It Is Ordered that Defendants' Motion for a New Trial as to the Issue of Damages Alone is denied.

It Is Ordered that Plaintiffs' Motion to Amend the Findings of Fact and Conclusions of Law and to Amend the Judgment is granted.

It Is Ordered that the Clerk is directed to enter an amended judgment forthwith that plaintiffs recover from the defendants the sum of \$429,883.40 with interest at the rate of 6% per annum from June 20, 1961 until paid.

* * * * *

[Title of District Court and Cause.]

Civil Docket

Civ-610 Pct.

PROCEEDINGS

Date

1961

July 28—Enter Amended Judgment for the plaintiffs George H. Nagel, Mabel J. Nagel, Robert T. Jenkins and Georgia Mae Jenkins, general partners, and Georgia Mae Jenkins, Trustee for James Henry Nagel, limited partner, doing business as Nagel Lumber & Timber Company, a limited partnership, and Nagel Lumber & Timber Company, a limited partnership, against the defendants Maurice Liberman, Joseph Grevey and Jack Grevey, co-partners, doing business as Duke City Lumber Company, and Duke City Lumber Company, a partnership, in the sum of \$429,883.40, with interest thereon at the rate of 6% per annum from June 20, 1961, until paid.

Date Order or Judgment Noted 7/28/61

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Maurice Liberman, Joseph Grevey and Jack Grevey, co-partners, d.b.a. Duke City Lumber Company, and Duke City Lumber Company, a partnership, Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit

(a) From the final judgment entered in this action on June 20, 1961.

(b) From the Orders, dated June 20, 1961, directing Judgment to be entered in accordance with the District Court's Findings of Fact and Conclusions of Law and directing the Clerk to enter Judgment.

(c) From the Final Judgment entered in this action on July 28, 1961.

(d) From the Orders, dated July 28, 1961, directing Judgment to be entered in accordance with the District Court's Amended Findings of Fact and Conclusions of Law and directing the Clerk to enter an Amended Judgment.

(e) From the Order, dated July 28, 1961, to the extent it denied Defendants' Motion to Amend the Findings of Fact, and to Amend the Judgment.

(f) From the Order, dated July 28, 1961, which denied Defendants' Motion for a New Trial as to Damages Alone.

Dated: August 25, 1961.

/s/ BURNHAM ENERSEN

/s/ FREDERICK O. KOENIG

Attorneys for Defendants

McCUTCHEEN, DOYLE, BROWN &
ENERSEN

JENNINGS, STROUSS, SALMON &
TRASK

[Endorsed]: Filed August 25, 1961.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in the case of George H. Nagel, et al, Plaintiffs, vs. Maurice Liberman, et al, Defendants, numbered Civ-610 Prescott, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said case, and that the attached copies of docket entries and minute entries are true and correct copies of the originals thereof remaining in my office.

I further certify that said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to-wit:

1. Civil Docket Entries.
2. Complaint.
3. Answer.
4. Amended Complaint.
5. Answer to the Amended Complaint.

6. Amended to the Answer to the Amended Complaint.
7. Plaintiffs' Notice of Hearing on Motion to Set for Trial Without a Jury.
8. Minute Order of July 14, 1959, setting the case for trial.
9. Minute Order of July 16, 1959, vacating the Order of July 14, 1959, and resetting the case for trial.
10. Minute Order of January 26, 1960, setting the pretrial hearing.
11. Minute Order of February 2, 1960, vacating the Order of January 26, 1960, and resetting the pretrial hearing.
12. Plaintiffs' Motion for Production of Documents and Notice of Hearing.
13. Reporter's transcript of proceedings at pretrial conference, February 5, 1960.
14. Deposition of Maurice Liberman (Vols. I and II—see Plaintiffs' exhibits 14 and 17 in evidence).
15. Deposition of Mrs. George H. Nagel (see Defendants' exhibit AA in evidence).
16. Deposition of Robert Thomas Jenkins (see Defendants' exhibit AB in evidence).
17. Deposition of Joseph Rosenthal.
18. Deposition of Thomas Cavanaugh.
19. Deposition of Robin Bishop (see Defendants' Exhibit B in evidence).

20. Deposition of Yale Weinstein.
21. Plaintiffs' Interrogatories.
22. Defendants' Objections to Plaintiffs' Interrogatories.
23. Minute Order of February 6, 1960, concerning interrogatories, production of documents, and trial of the case.
24. Minute Order of February 10, 1960, continuing date of trial.
25. Minute Order of February 12, 1960, extending Defendants' time to answer interrogatories and to produce documents.
26. Minute Order of February 16, 1960, and vacating the order of February 10, 1960, and resetting the case for trial.
27. Minute Order of February 17, 1960, vacating the order of February 16, 1960, and resetting the case for trial.
28. Defendants' Answers to Plaintiffs' Interrogatories.
29. Minute Order of March 23, 1960, vacating Order of February 17, 1960, and resetting the case for trial.
30. Transcript of proceedings at the trial, May 3, 4, 5, 6, 10, 11, 12 and 13, 1960, in 8 volumes.
31. Minute Order of June 17, 1960, extending time for filing memoranda.
32. Minute Order of September 9, 1960, extending time for filing memorandum.

33. Decision of the District Court, December 30, 1960.

34. Minute Order of January 4, 1961, concerning proposed findings of fact and conclusions of law.

35. Minute Order of May 9, 1961, setting hearing on proposed findings of fact and conclusions of law.

36. Reporter's transcript of proceedings at hearing on Findings of Fact and Conclusions of Law, June 12, 1961.

36a. Schedule Showing Computation by the Court of Damages Sustained by Plaintiffs.

37. Reporter's transcript of comments of Mr. Enersen on the findings by the Court.

38. Findings of Fact and Conclusions of Law, June 20, 1961.

39. Minute Order of June 20, 1961, directing Clerk to enter Judgment.

40. Entry of Judgment in Civil Docket, June 20, 1961.

41. Plaintiffs' Motion to Amend Findings of Fact and Conclusions of Law and to amend Judgment Accordingly.

42. Defendants' Motion to Amend the Findings, to Make Additional Findings and to Amend the Judgment Accordingly, and Motion for New Trial as to Damages Alone.

43. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Amend the Findings, etc., and for a New Trial as to Damages Alone.
44. Minute Order of July 5, 1961, setting oral argument on post-trial motions.
45. Reporter's Transcript of Proceedings, July 20, 1961.
46. Amended Findings of Fact and Conclusions of Law, July 28, 1961.
47. District Court's Memorandum Ruling on Motions to Amend Findings and Conclusions and to Amend the Judgment, and on Defendants' Motion for Additional Findings and Motion for New Trial as to Damages, July 28, 1961.
48. Minute Order of July 28, 1961, ordering the Clerk to enter Amended Judgment, granting in part and otherwise denying Defendants' post trial motions and granting Plaintiffs' post trial motion.
49. Entry of Amended Judgment in Civil Docket, July 28, 1961.
50. Plaintiffs' Bill of Costs, Notice of Taxing of Costs; Clerk's Taxation of Costs.
51. Notice of Appeal.
52. Stipulation for Deposit of Time Certificate of Deposit in Lieu of Supersedeas Bond.
53. Designation of contents of Record on Appeal.
54. Order Extending Time to File Record on Appeal and Docket Appeal, to and including November 18, 1961.

55. Order Extending Time to File Record on Appeal and Docket Appeal, to and including November 23, 1961.

I further certify that the following original exhibits are transmitted herewith as a part of this record on appeal, to-wit:

Plaintiffs' exhibits nos. 1 to 6, 7a to 7i, 8 to 14, 17, 20, 21, 22, 24, 25 and 26, in evidence; and 15, 16, 18, 19 and 23, for identification.

Defendants' exhibits A to K, N to Q, X, Y, Z, AA and AB, in evidence; and L, M, and R to W, for identification.

Witness my hand and the seal of said Court this 20th day of November, 1961.

[Seal] /s/ WM. H. LOVELESS,
 Clerk,

In the District Court of the United States
for the District of Arizona

No. 601—Civil—Prescott

GEORGE H. NAGEL, MABEL Y. NAGEL,
ROBERT T. JENKINS, and GEORGIA
MAE JENKINS, General Partners, and
GEORGIA MAE JENKINS, trustee for James
Henry Nagel, limited partner, doing business
as NAGEL LUMBER & TIMBER COM-
PANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited
partnership, Plaintiffs,

vs.

MAURICE LIBERMAN, JOSEPH GREVEY
and JACK GREVEY, Co-Partners, doing busi-
ness as DUKE CITY LUMBER COMPANY,
and DUKE CITY LUMBER COMPANY, a
partnership, Defendants.

TRANSCRIPT OF PRE-TRIAL HEARING

February 5, 1960

Tucson, Arizona

Appearances: For the Plaintiff, Messrs. Cox &
Cox, by Mr. James J. Cox, Jr. Moore & Romley,
by Elias M. Romley and Phillip A. Robbins. For the
Defendant, Jenckes, Jenckes, Strouss. Salmon &
Strouss, by Mr. Rex H. Moore and Mr. A. J. Pfister.

The Above Entitled Matter Came on for pre-trial
hearing before The Honorable James H. Walsh.
U. S. District Court Judge, [2]* at Tucson, Ari-

* Page numbers appearing at foot of page of original Reporter's
Transcript of Record.

zona, on the 5th day of February, 1960, commencing at the hour of 1:45 o'clock p.m., and the following proceedings were had, to-wit:

The Court: Everybody, I take it, is satisfied with the pleadings as they stand now?

Mr. Romley: There is no answer.

Mr. Moore: We haven't answered the amended complaint yet.

The Court: You are going to file an amended answer?

Mr. Moore: Yes.

Mr. Romley: Rex, can you file it by the middle of next week?

Mr. Moore: Yes, if I can——

The Court: Do you want an order permitting it or is that understood?

Mr. Romley: That's understood.

Mr. Moore: I don't know when our time expires, we have been more or less fighting time on depositions and other schedules and so forth.

Mr. Romley: There is no problem, just so we have it a few days in advance of the trial.

Mr. Moore: If I can learn what you are trying to plead here today, I will be better prepared to answer it.

The Court: I will ask to start with, since there seems to be some difficulty, you state if you will [3] the contentions of yours and the other parties as you understand them, and then Rex can answer that and I will get a little close-up of just about what this thing is about.

Mr. Romley: In this case, if the Court pleases, the plaintiffs seek to recover damages for the breach of an agreement entered into by the plaintiffs and the defendants on September 20, 1958, a memorandum of which agreement was signed three days later on September 23rd. That memorandum is attached to the amended complaint as Exhibit A. I believe that the execution and existence of that agreement is admitted.

By that agreement, it is the contention of the plaintiffs and we believe the evidence will show that the plaintiffs were approached by Maurice Liberman, one of the defendants, and a partner of the Duke City Lumber Company. The first contact—I don't know how much detail you want, Judge.

The Court: Well, you know.

Mr. Romley: I can give it to you in substantial detail if you wish, it might be a little better if I did.

The Court: Yes.

Mr. Romley: Let me go back a ways. For, oh, twenty years perhaps or more the Nagel Lumber and Timber Company has been operated in Winslow. Its timber was supplied from what is known as the Shevalon (phonetic) Working Circle located a few miles out of Winslow, generally being purchased under [4] forest service contracts with the Government. But also more recently under an agreement to acquire some of the so-called Aztec

timber, I think your Honor may be familiar with that, undoubtedly you are. The Arizona Timber Company as a similar and competing concern also located in Winslow, was a corporation and for some time prior thereto it had been operated under the name of the Winslow Lumber Company, or some derivation of that name, I think the only change being in the change of the corporate name from Winslow Lumber to Arizona Lumber. The owners of that corporation were two partners, a Mr. T. P. Gallagher and a Mr. A. I. Kaplan. These two gentlemen also had another operation that they called the Bernalio Lumber Company and the New Mexico Timber Company, also a corporation operating in New Mexico. The Arizona Timber Company was likewise supplied with timber from the Shevalon Working Circle, and that situation had existed for many years.

These two were the only companies, Arizona Timber and the Nagel Lumber and Timber, were the only two concerns operating in the Winslow area, or I should say, who had mills in the Winslow area. They got along fairly well as competitors and we believe the evidence will show that there was an agreement between these two companies, Arizona Timber and Nagel, to this effect:

That in the event one should desire to sell, the other [5] would have the right of first refusal, the option to purchase upon the same terms and conditions. I think that the existence of that agree-

ment is substantially admitted although I am not quite clear from the deposition whether it is a fact or not.

So in September of 1958, a Mr. Maurice Liberman, who is one of the three partners of Duke City Lumber Company, the other two being his brothers, Joseph Grevey and Jack Grevey, Maurice Liberman contacted Tom Gallagher, one of the owners of the Arizona Timber Company, with regard to the purchase of the mill and timber of the Winslow Timber Company, and perhaps other properties, but so far as this litigation is concerned primarily the Arizona Lumber Company and its mill and standing timber. They had a conference on the 10th or 11th of September, 1958, unbeknown to the plaintiffs. On the following day, September 12th, a proposal was prepared by Tom Gallagher for the signature of Maurice Liberman whereby Liberman offered, on behalf of the Duke City Lumber Company, to purchase the Arizona Timber Company and its mill and standing timber, and it was for—I won't go into too much of the details, because some of it escapes me. But so far as I believe now pertinent, he was to purchase it for \$500,000 and was to pay separately for the standing timber. But in that letter dated September 12, 1958, there appears a paragraph, it's the second or third paragraph, which recites [6] that Liberman knows of the existence of this first refusal agreement and recognizes that before they can proceed with a sale from Arizona Timber to Liberman, that they must present the proposal to the

plaintiffs, our clients, the Nagel Lumber and Timber Company. That letter was delivered by Gallagher, who prepared it, to Liberman. Liberman in turn conferred with his attorney, Judge Johnson, regarding that letter. And there were some changes made or suggestions for changes and it was redrafted, I think I was in error when I said September 12th. I believe the first letter was on September 11th and the final letter was on September 12th, 1958.

It was redrafted, but as redrafted it similarly contained this same paragraph recognizing that the proposal had to be submitted to the Nagel Lumber and Timber Company under this first refusal agreement. Some six days later on September 18th, 1958, Mr. Liberman, whose office is in Albuquerque, called Mrs. Nagel, whose office and home is in Winslow, over long distance and made an appointment to come over and see her in Winslow with regard to the Arizona Timber Company.

Mrs. Nagel is one of the plaintiffs and a partner in the Nagel Lumber and Timber Company, due to the incapacity or disability of her husband she is the active manager of the Nagel Lumber and Timber Company assisted by her son-in-law, Robert T. Jenkins, who also is a plaintiff in the [7] case.

Now, the appointment made by Liberman to see Mrs. Nagel was made on September 18th and he was to come over on September 20th, which was a Saturday. He chartered a plane, flew to Winslow,

and by arrangement over the telephone, Bob Jenkins picked him up at the airport and they went to the Nagel office on Saturday morning, September 20th. At that time they learned the purpose of Liberman's visit. He wanted to know if the Nagel Lumber and Timber Company was going to buy this company, the Arizona Timber Company, that he was interested in acquiring under this September 12th proposal. And incidentally, he had deposited \$10,000 with Gallagher with that proposal of September 10th. *That* was some considerable discussion regarding the matter, culminating, as I recall, in a proposal by Liberman that the two of them, that is to say Duke City and Nagel together, acquire the Arizona Lumber Company or the Arizona Timber Company on a 50-50 basis.

There was some discussion pro and con, the details of which perhaps are not necessary. But one phase of the discussion centered on how, if they acquired the property, how it would be operated and it was agreed that Bob Jenkins, who, as I say, is one of the partners of the plaintiffs here, the Nagel Lumber and Timber Company, and who was assisting Mrs. Nagel in the management, agreed that he would manage this new property if, as and when acquired. There was some talk of how the payment should be made if the properties were [8] acquired, Mrs. Nagel pointed out, this was in September and she pointed out that their inventory status would be such by April 30th that they would

be in better position at that time to exercise their right to purchase in the event this transaction were closed and the parties agreed that might be done by April 30th following.

Then Mr. Liberman returned to Albuquerque. By arrangement, Mr. Jenkins was to be in Liberman's office on Tuesday, September 23rd. At that time they were to sign a short memorandum of this agreement and following which the parties had agreed that Bob Jenkins would go to Tom Gallagher's office, who also is in Albuquerque, and tell him that they had concluded not to exercise their first option, so that Gallagher could be free to deal with Liberman. I believe it was at Liberman's request that Gallagher was not to be told any more than that except that they were not going to exercise the first refusal. So on September 23rd Bob Jenkins, together with Dale Nelson, who is comptroller of Nagel Company, went to Albuquerque. They met there with Maurice Liberman and his brother, Joe Grevey, who is a partner and defendant in this case. Liberman had already prepared this memorandum or this latter dated September 23rd, 1958, which, as I say, is attached as Exhibit A here and it sounded all right to Bob Jenkins, so he signed it on behalf of the Nagel family as they are designated here instead of Nagel Lumber and Timber [9] Company, it's signed by the Nagel family and by Robert T. Jenkins. And after that he went to Gallagher to fulfill his part of the agree-

ment and told Gallagher they had decided not to exercise their right of first refusal, and that he, Gallagher, was free to deal with anybody else.

Also to prearrangement, Jenkins called Liberman and told him that he had so advised Gallagher, so that Liberman could follow on through and see if he could consummate this purchase.

Now, I assume that your Honor has read this letter, have you?

The Court: Yes, I have read it.

Mr. Romley: Then I won't go into the details there. Then the next step of importance that comes to mind is this: That in a few days later Liberman renewed his negotiations, or resumed his negotiations with Gallagher. There was a talk for a considerable period of time. Early in October, October 8th, 9th and 10th, apparently, according to the depositions, there were meetings between Liberman and Gallagher, among others, and one time it appeared that Gallagher wanted to purchase the properties himself, that is buy out his partner, A. I. Kaplan, who was a rather elderly and ill gentleman who was his partner, and who lived in New York, and who, incidentally, subsequently died.

The arrangement—as I say, Gallagher at one time [10] contemplated buying out his partner himself or together with his brother and some others who also were in the lumber business. A few days later all of the parties met in New York City, apparently they wanted to talk with Mr. A. I. Kaplan and also with a Mr. Jack Kaplan, who is a

brother of A. I. Kaplan, but was not involved in this transaction in the sense of having any ownership or interest.

There were several meetings in New York. On the early morning of October 16, 1958—I believe if my memory serves me right it was about 3:00 in the morning, I may be mistaken, Arizona time—Mrs. Nagel received a telephone call from Mr. Liberman in New York City. He told her very briefly of the negotiations that were taking place there, and as I recall did not give her the details of the agreement that had been reached. He asked her to release him on the option agreement of September 20th as incorporated in this letter of September 23rd, and she told him that she would have to talk to her son-in-law and that she would do so and that her son-in-law was then in Phoenix, and she would contact him in the morning. She called and reached him in Mr. Cox's office. Mr. Cox has been the attorney for the Nagel family for some considerable period of time. After that talk she sent Mr. Liberman a telegram stating that she was not willing to release the option at that time; Mr. Liberman called her again and still a third time, the last discussion being at [11] about 6:00 o'clock on the evening of October 16th. He never, during any of those discussions, told her the terms of the agreement. She still insisted on her rights to purchase under the terms of the agreement. Mr. Liberman concluded his business in New York. They returned—he returned to Albuquerque, an agreement was

prepared whereby these assets were sold, substantially on this basis, the mill and its equipment, et cetera: For a total of \$650,000 payable in 65 equal installments of \$10,833.33 a month, as I recall, with provision for acceleration. And the timber part to be paid for on the basis of so much per thousand feet as taken out. That agreement finally signed by the Gallagher interests and by the Liberman interests is dated November 6th, 1958.

Sometime after that when the plaintiffs, Nagels, learned that the deal had been consummated they went to Liberman and asked him for the terms on which he had bought so that they might know whether they would want to exercise their option. There was several meetings, some with Liberman alone, some with Liberman and Mr. Cox, some with Liberman and Judge Johnson and Mr. Cox. Liberman refused, steadfastly, to tell them the terms of the agreement or to show them the terms of the agreement until sometime in January or February, I believe, of 1959. And they finally let the Nagels see the agreement in Albuquerque, I believe it was, in Judge Johnson's office. That's when the plaintiffs learned for the first time [12] what were the terms of this agreement. It is being purchased for nothing down and payment on this deferred basis as I mentioned. The Nagels determined to exercise their option, decided that they wanted to go ahead and were refused the right, by the defendants, to proceed in the exercise of their option.

After it became evident that they were steadfast in that position, they—this suit was filed, incidentally, prior to the April 30th mentioned in this letter. In substance, that, I believe, covers the issues relating to the contract.

Have I omitted anything of consequence that you recall?

Mr. Robbins: No, unless you want to point out that it has been narrowed down to the one thing.

Mr. Romley: Oh, yes. When the deposition of Mr. Liberman was taken in Phoenix in December, incidentally the original will be filed today, it was a rather extensive one. It required two days and two sittings to take that deposition. He testified in his deposition, and I will read from it here because I think it is important, commencing at page 162 of the deposition, said in substance this:

“That I’m not now willing to perform the September 23rd agreement, was not willing to perform it in March of 1959 during the meeting in Judge Johnson’s office. In March of 1959 the Nagel Company told me it was ready, willing and able to exercise the option and I refused to allow it to [13] exercise the option.”

That’s page 164. Then at page 165, he said that the only reason, and I’m quoting this part, the other was a digest. This is quotes:

“A. The only reason that I refused to perform was that I submitted the proposal to Mrs. Nagel in

accordance with my understanding of our agreement and she refused to come in because she told me she didn't want to take on responsibilities and didn't have the money for it, and didn't want to come in and that, in my opinion, terminated our agreement."

Then I asked this question:

"Q. It is your claim that you were released from the agreement?

"A. Yes, sir.

"Q. And it is your claim that you were released only in the one or two or three of those telephone conversations on October 16th, is that right?

"A. Yes, sir.

"Q. Because you say Mrs. Nagel told you, 'We don't want to come in or we are not willing, we are not coming in, or we can't afford to come in,' is that right?

"A. She told me also that I was released.

"Q. That is the only basis then, what was just now said of your saying that you don't have to go ahead with this [14] agreement that they entered into with you, is that right?

"A. Yes, sir."

So it would appear, if the Court pleases, that by the admission of the defendant, the issue has been narrowed to one question of whether the plaintiffs did in fact release the defendants from this agreement dated September 23rd, 1958.

Mrs. Nagel's deposition was taken and Mr. Jenkins's likewise was taken.

Mrs. Nagel was emphatic in saying that there was no such release given, and the telegram or copy of the telegram isn't—the telegram sent recites that she would not release him. Now, I think that covers the liability phase of the action. I can, if you wish now, or after counsel has touched on liability, go into the damage part. Or perhaps your Honor would rather that we not consider that now.

The Court: I don't think that's necessary.

Mr. Romley: I agree, I don't think it's necessary right now.

The Court: Mr. Moore?

Mr. Moore: Yes, if your Honor please. Mr. Romley has made a statement which he says are the facts. His statements consist of some things that his people have testified to which have been directly and positively contradicted and will be contradicted by the evidence.

As we understand this case, a summary is as [15] follows:

The organizations of the companies, Gallagher Companies as referred to in the complaint and the Nagel Company as I understand it are relatively correct as stated by Mr. Romley, although I was under the impression that Jack Kaplan owned an interest in the corporate organization, although not in the partnership, Bernalio Lumber Company. At the time of the Aztec Timber sale, when it was ultimately divided up more or less by Southwest Lumber Mills between various people, Duke City

Lumber Company which is a partnership consisting of Maurice Liberman, Joseph Grevey and Jack Grevey, acquired some approximately sixty million feet of timber. Thereafter they entered into a pooling agreement with Arizona Timber Company which may be called Winslow Timber Company, but later it was Arizona Timber Company which in fact is the mill and plant involved in this lawsuit at Winslow. And they entered into a milling agreement with Arizona Timber, and certain timber was cut out of a portion of the pooled timber of Arizona Timber and Duke City Timber and milled through this mill.

In 1958 rumors had it, and that will be the evidence, that Gallagher was selling to everybody, they talked merger, they talked sales, they talked joint operations, and this proposal of September 12th from Gallagher to Liberman was prepared, was signed by Liberman and a check for \$10,000 [16] deposited.

Now, Mr. Romley left out a very important fact. On September 18th, 1958, at which time Mr. Gallagher and Mr. Lee Cutch of the Kibab Lumber Company, Whiting's interest at Flagstaff, Mr. Cox and others were or had been in San Francisco on a rate hearing following a lumber meeting in Las Vegas. Liberman received a telephone call on September 18th from one Tom Cavanaugh, who is the comptroller of Arizona Timber Company, saying to him, "Maurice," or Mr. Liberman, whatever he

calls him, "I have received a call from Gallagher to tell you that the September 12th proposal is off. There is no deal."

The facts will develop that Gallagher at that very moment was negotiating with Whitings to sell it to Whitings.

Now, let me back up a moment on the first refusal.

The proposal which was written by Gallagher and submitted to Liberman contained, and Mr. Liberman's testimony I believe is that when he read it was the first time he had ever heard of it, but it recited something to the effect, "We have a first refusal arrangement with Nagel." Now, Mrs. Nagel has testified that that was, as I construe her testimony, that that was a gentleman's understanding, there is no written memoranda, there was no written agreements, there are no letters, simply a neighborly or gentlemanly understanding, "If I decide to sell, I will talk to you and give you a chance." I think the evidence will show that's what it boiled down to. [17]

Now, on September 18th Mr. Liberman telephoned Mrs. Nagel, not to make an appointment to talk to her, but to find out, Did you buy the Arizona Timber mill, and she said no, and other discussion. She says, "I want to talk to you. I will come over to Albuquerque." Now, this is Liberman's testimony. And Liberman said, "Well, that's not necessary, I'll come over to Winslow." And he did go over to Winslow on September 20th, and they had a long conference and they discussed various

things. They discussed mergers, they discussed sales, they discussed various things and Mrs. Nagel, I believe according to Mr. Liberman's testimony, proposed the purchase together. I don't think it is important actually, your Honor, which one ultimately suggested it. She asked Mr. Liberman what he would think about Jenkins managing the two plants, and Liberman said, "I wonder if he has enough time." "Well, we think so." His testimony is, "I will give that consideration if we make a deal." There was no agreement there that Jenkins would manage for both of them.

The April 30th thing came up, this—they talked about money and Mr. Liberman told Mrs. Nagel that he would assist her in securing, if they ultimately worked out a deal, he did go back, he did prepare this letter. Jenkins came over and signed it, Liberman says, and I believe the letter itself can only be construed one way, it is not a buy and sell agreement, it is agreement that upon notice from either [18] to the other that we have now a proposal which will go through, the other would have the right to participate in that purchase at that time. The April 30 and the periodic extension was, I believe the evidence will show for the reason that they had been negotiating and negotiating and negotiating, both of them, and there was no certainty when any negotiations could be concluded as it was put in so that if either of them negotiated a proposal within the time limitations, the other

would have the right to come in then and participate in that purchase, and that's just exactly what it says.

Now, in this September 20th meeting when in Winslow Mrs. Nagel, according to Mr. Liberman, told him that they could not buy this plant at that time, and that they were not going to buy it. And after the September 23rd letter was signed, I believe the evidence is that the Nagels told Liberman on the 20th that they were going to tell Mr. Gallagher that they could not swing the deal, or words to that effect. Jenkins came over on the 23rd, the letter was signed, and I don't believe the evidence will establish that it was Liberman who said to Jenkins, "You go tell him you are not going to take it, you have given up your first refusal." Now, the letter itself, your Honor, there is no first refusal given up if they had a first refusal agreement, it gives itself, gives either one the opportunity to negotiate, advise the other of the negotiation and the other has the right to come in and participate. [19] The letter does not say, "If I buy it, I will, any time up to April 30th, '59, sell you half of it, or if you buy it, you will, up to April 30th, sell me half of it." It says participate in the purchase.

Now after this agreement on the 23rd, Mr. Liberman got word in some manner that Gallagher, who must be quite a character, was telling people that Liberman had blackmailed him, that he had coerced the Nagels not to buy this mill, et cetera. And on the 10th day of October, 1958, Liberman

being quite upset over this language, in fact Gallagher showed him a letter and a telegram he had sent to the Kaplans where it referred to Liberman coercing people and blackmailing Gallagher and blackmailing the Nagels to get out of the deal. He put in a telephone call for Mrs. Nagel. Mrs. Nagel wasn't in the office. Later Mr. Jenkins called him back and because of Liberman's being so upset over what he considered slanderous statements, and was planning to go to New York to the Kaplans to straighten that out, wanted exact evidence as to what Jenkins said and his secretary listened to that telephone conversation and made, according to her testimony in the deposition Mr. Romley took day before yesterday in Albuquerque, a verbatim transcript, and statements of Mr. Jenkins in that telephone conversation completely destroy what Mr. Romley has outlined as facts that they gave up a first refusal. That will be in evidence later. There is no need [20] to go into all the detail of it.

Liberman then met with Gallagher to see if he could renegotiate this thing and open it up. He learned that Gallagher, Rale Weinstein, Tom Cavanaugh, Charlie Wickens, employees of Arizona Timber, those latter three, were planning to buy the whole thing themselves, all of the Kaplans' interest, New Mexico and Arizona. He learned that they had been to the bank, they were trying to arrange commitments and they discussed various things, and he discussed with them the possibility that if they did that, that either that group or Gallagher

and Liberman together buy the Kaplan interest and take over the Arizona Timber plant at Winslow. He testified in his deposition, "Had I got that done I would have called Mrs. Nagel and told her that's the best I could, you can participate with me if you want to." He didn't get anything down there, so he went to New York and they had many, many hours, in fact I think the last session was 15 hours.

Now, our evidence will be, and records will bear it out to some extent, their conference concluded at 2:00 o'clock in the morning New York time when they finally orally reached an understanding or meeting of the minds insofar as Liberman's group is concerned, and the Gallagher group is concerned with respect to the sale of the Winslow plant.

Now, the September 12th proposal to Liberman was \$500,000 for the plant at Winslow, Mrs. Nagel told Liberman [21] on the 20th, and so testified, Gallagher had priced the plant to her at \$500,000. We have information that the price had gone up to \$600,000 and some of Gallagher's other negotiations, and at 2:00 o'clock in the morning on October 16th they had a meeting of the minds, that the plant would be bought for \$650,000, not \$500,000; and they would buy timber at certain prices and so forth, there are lots of details to that.

Now, the 9:00 o'clock New York time, 6:00 o'clock Winslow time, not 3 in the morning, Liberman telephoned Mrs. Nagel and told her of the deal, the price, and he forgot to tell her that it was terms instead of cash. And she said to him, in substance,

“Maurice, that’s more than we want to commit ourselves for. We don’t want to go into it.” He hung up the telephone and Joe Rosenthal, who is his advisor and a certified public accountant in New York who had been in the negotiations with him, said, “Maurice, you forgot a very important element, that the \$650,000 is not cash, it’s terms.” He picked up the telephone and called Mrs. Nagel back. In the first conversation he said, “Well, if you don’t want to come in, then send me a telegram, because I have got to make financial commitments, I have got to go to my banker and they will want a clean deal, send me a telegram releasing the letter.” He said, in fact, “I don’t know whether the letter applies to this agreement, because it’s different than what we talked about. But nevertheless, here it is. I want you [22] in it if you want to come in, and I’d like for you to come up here so we can negotiate various things.” And there are 50 different things that would have had to be negotiated between Liberman and Nagel with reference to the operation that they never even talked about, and Mrs. Nagel’s deposition will show a great many of those. So he called her back in a few minutes and said, “I forgot to tell you this \$650,000 isn’t cash, it’s terms.”

Now, he says in his deposition, “I don’t remember whether I gave her whether it’s monthly payments or quarterly, but it took no cash.” And he talked for some time, and again asked her to come in. He asked her if she sent the telegram, she said, “No, the telegraph office isn’t open until 8:00 o’clock.”

Well, he asked her again to come in, and she again told him that they were not interested in it, it was more than they wanted to commit themselves for, it was too big a deal at a price, or words to that effect.

He said, "All right, well, send me the telegram." At the 2:00 o'clock meeting in the morning for the very purpose of Liberman to telephone Mrs. Nagel, he asked them to wait until 11:00 o'clock before it was final, final commitments made and the other side said, "Well, if you wait until 11:00 o'clock and can say no, so can we." That's all right. At 11:00 o'clock New York time he had to say yes or no. [23] At 11:00 o'clock New York time he said yes, after he talked to Mrs. Nagel twice and she turned him down. Later, an hour or so, he gets the telegram saying "we do not desire to release our option at this time." He telephoned her again and the records show three telephone calls from New York, Mrs. Nagel didn't remember but one in her deposition, that's 3:00 o'clock in the morning. And all she said was, "Send me a release." She remembered that there must have been one more, but she didn't remember whether it was that day or the next day or two days later. Maybe there were three, but she didn't know when. He called her back. That call was completed, according to our evidence, about 6:00 o'clock New York time and he again asked her, "Notwithstanding your telegram, Mrs. Nagel,

if you will come on up here, work this up, I will give you an additional 48 hours and hold this thing so that we can work out our deal." And she again told him, "No, it's more than we can handle. We are not interested now." They did then, before he got the telegram, lawyers in New York were preparing a memorandum of the sale agreement for Gallagher to initial. That was prepared, quite a lengthy document, and they simply initialed the pages because it was a memorandum of an agreement.

Lieberman then returned and in Albuquerque in November, a lawyer came out from New York, I think there was another lawyer in Albuquerque, and Judge Johnson, and they negotiated almost a week, and finally they formalized a contract. [24] And Lieberman's group did buy the plant, they did buy the timber. Now, Mr. Lieberman did take the position in his deposition, this agreement means to participate in the purchase, and I was turned down. I had to make commitments, and he did make commitments. When he signed that contract he made a commitment of almost \$2,000,000 it is figured out, it's \$1,750,000, or something like that. He did go to the bank and make arrangements for finances if he needed it, and he was on the line.

Now, in substance, your Honor, that is the main fact with respect to what they did.

Now, what I meant a moment ago when I said I am not sure from Mr. Romley's amended complaint, as I read his amended complaint, I can read it in one way and it looks to me like he is trying

to plead fraud, a fraudulent inducement to give up something. I read it another way and it looks to me like he is trying to base his cause of action on an oral agreement. The original complaint says that the oral agreement was reduced to writing in the September 23rd letter. His amended complaint says the oral agreement is evidenced by the September 23rd letter. Now, I think that actually before I answer I need to know, are we being sued for fraud? Are we being sued on an oral agreement which is in the teeth of the statute of frauds? Are we being sued on the September 23rd agreement? And I honestly cannot tell from his complaint, and I think that now is the time to define those issues. We have got some other [25] matters to take up here, we have got an armload of written interrogatories which I just was able today to file objections, serve objections. We have got motions to produce documents, I don't know as it is necessary to get into detail of those at this moment.

The Court: To me the cause of action, as I understand him in the complaint, is based upon the option which the plaintiffs contend was given them by the agreement of September 23rd. You don't mean that what is attached as Exhibit A is all of the terms and provisions, I mean that the agreement is evidenced by the September 23rd agreement?

Mr. Romley: That's exactly what we say in our complaint, the agreement was made on September 20th, and that this letter evidences that agreement.

Mr. Moore: Does that mean, your Honor, that we are defending an oral agreement?

Mr. Romley: Based on an oral agreement. Certainly the September 23rd letter there would be certain evidence admissible to interpret certain provisions of it.

The Court: It would be all the terms that were not inconsistent with or contradictory of this, I take it that those would be admissible; and to me there certainly is some ambiguity about the agreement.

Mr. Moore: There is to all of us.

The Court: As you describe what it means to each of [26] you, I can see that you are poles apart on what it does. But basically it is a suit on a contract, and a contract that is evidenced by the September 23rd memorandum, and of course what all of its terms and provisions are and what it means would be resolved upon the introduction of the testimony.

I take it there is no disagreement about my understanding of what you are suing on?

Mr. Romley: I think you are absolutely correct, your Honor, this letter is evidence of the agreement entered into by the parties. If there are any ambiguities, if the Court feels there are any ambiguities, they can be explained.

Mr. Moore: Could I inquire of Mr. Romley, your Honor, is he basing any part of this complaint on fraud?

Mr. Romley: Well, I might in frankness say this, your Honor: When we commenced the taking of depositions, incidentally Mrs. Nagel's was taken first and then Bob Jenkins, and then Mr. Liberman, at the outset I suggested that we stipulate that we have a pre-trial conference, which I was sure your Honor was going to have anyway, and that the pleadings might be amended at any time prior to the expiration of thirty days before the trial, the cause had then been set for trial. I didn't know what the defendant Liberman was going to contend, I hadn't yet taken his deposition when we made that stipulation, and after I took his deposition I concluded it advisable to amend, and that's why I did amend based on his [27] broken field running, not mine.

(Discussion off the record.)

Mr. Romley: But getting back here, in the deposition Liberman testified and we learned of this situation, if it is true, for the first time. He testified that about October 8th, 9th or 10th, 1958, he made a proposal to Tom Gallagher that he, Liberman, and Gallagher buy the business together.

I said, "Do you mean to the exclusion of the Nagels? You had a deal with Mrs. Nagel that she would participate with you on the 50-50 basis in buying it." And he thought a while and he said, "Oh, no," he said, "If I'd have bought it that way then she could get half of what I bought." And then I said, "If you bought 10% and Gallagher bought 90% you'd say Mrs. Nagel, you can have

the other five, I will keep five, you keep five?" And he said, "Yes, that's what I meant." Now, with that in mind, if your Honor pleases, it occurred to me that if he in fact in September, 1958, when he entered into the agreement with the plaintiffs, did not intend to perform that agreement but in fact intended not to perform it, then I feel squarely within the rule announced with the *Waddell vs. White* case where the Supreme Court of Arizona held expressly that an agreement entered into by a party with the present intention not to perform that agreement constitutes a fraud on that party, and that is why I have the allegation in the complaint, I don't recall the paragraph now, to that effect. [28] I think it is one of the later paragraphs here.

In paragraph 7: "At the time of making the aforesaid proposal and representation and entered into the aforesaid agreement, the defendants had no intention of performing their covenants and obligations thereunder, plaintiffs were unaware of defendants intentions and entered into the aforesaid agreement in good faith."

Now, the *Waddell versus White* case holds as I have stated. Now, I don't know, of course, which version the Court is going to accept as to what transpired, nor does your Honor until you have heard the evidence and observed the witnesses and noted their demeanor, but if in fact he never intended to keep this agreement with the Nagels and entered into it with the idea of getting them out

so that they could have a free hand in the deal, because he knew he had to get them out under that first refusal.

The Court: If you are pleading fraud there, I doubt you have done it. I don't think under the requirement of the rules that you allege it with particularity that you have done it, you have no more than hinted at it in the allegation and I would say now that the complaint does not state a cause of action for fraud, because the rules are very specific on that, that a cause of action for fraud must be alleged with particularity.

Mr. Romley: Well, your Honor, I have that rule in [29] mind, and I thought, you were about to say that I hadn't pleaded the nine elements that usually are pleaded in the complaint, that is not necessary.

The Court: The reason I feel you haven't pleaded it with particularity is because I have read it three times, and this is the first time that it ever dawned on me that you might be getting at the White case.

Mr. Romley: This is all that I think that anyone can plead with regard to a situation such as this. We say the fraud, if any, consisted of his entering into an agreement with the present intention never to perform that agreement. Now, you can't say any more than that, I don't know what additional particularity we can give.

The Court: I think there is a little more than that to it, and I think even the Waddell case has

more than that in it; but that's my view of it presently, that the complaint does not sound fraud, but simply contract, breach of contract.

Mr. Romley: I will be frank to say that that is primarily our theory, your Honor, breach of contract. But I put the other in for the reasons I stated, when it developed at the deposition. Now, I fail to understand counsel's point that he doesn't know how to answer this without knowing how to plead, if it is not true that he had this fraudulent intention all he has got to do is deny it.

Mr. Moore: That's true, I can deny that. [30]

Mr. Romley: That's all right, go ahead.

Mr. Moore: What I have in mind by that, your Honor, was that if this is, this cause of action is based upon an oral agreement which I didn't think it was, but two or three readings I was in doubt, naturally I would plead the statute of frauds. If it is not based on an oral agreement, why, the statute of frauds has nothing to do with it. And as far as the fraudulent intent or at the time he made it, of course, we deny that. Because you remember Mr. Romley that his testimony was that they had been negotiating on various things, and he was at that moment in fact trying to salvage what interest he could up there, and said, "Whatever I bought I would have submitted it to Mrs. Nagel just as I did when I called her on the 16th of October."

Mr. Romley: Even if there were any merit to the claim or to a plea of the statute of frauds the written memorandum of September 23rd takes it

out of the operation of the statute, signed by the parties to be charged.

Mr. Moore: If we are on that letter, why, I am clarified, I can file an answer.

The Court: What about these interrogatories?

Mr. Romley: We served and filed a number of interrogatories, your Honor, I believe it was on Friday of last week.

The Court: I have some here stamped filed the 29th. [31]

Mr. Romley: That's it.

Mr. Moore: That's the day I think I received them.

The Court: Forty-seven?

Mr. Romley: Yes.

Mr. Moore: And here is our written objections to them.

Mr. Romley: Those objections were just served on us, we haven't read them, they were served here this afternoon.

The Court: This is a poor way to bring these up, I have no chance to study them. I mean you just can't rule off the cuff on them.

Mr. Romley: Would your Honor like to hear argument on these objections perhaps next week?

(Discussion off the record.)

The Court: All I can do with these, and let me have what is here and let me take them tonight and tomorrow and what I will have to do with these is to get them tonight and tomorrow and then enter orders and ask the clerk to telephone Phoenix so you will get them promptly.

Mr. Moore: I apologize for being late with it, but it's not my fault or Mr. Romley's fault.

(Discussion off the record.)

Mr. Moore: And on the motion to produce documents I haven't prepared anything. I would like to just tell the Court orally what I think about that, and then let the Court [32] rule.

The Court: I don't have that motion. Does somebody have a copy of that?

Mr. Romley: Yes, we have.

Mr. Moore: Your Honor, on this motion to produce, would you rather read them?

The Court: No, if you want to take your copy and go over them—

Mr. Moore: I want to discuss all of them and I have got another idea about the whole thing that I want to drop into your Honor's lap.

First, the evidence discloses from depositions which have been taken, as I said the Duke City Lumber Company is a partnership of three individuals. They own or operate or in one way or another five different mills; in addition to that the same three partners own Transit Remanufacturing Company, which is a corporate entity, and one or two other corporate matters in lumber, one that probably is not tied in here in Utah, but their business operations as far as the actual operation is concerned is primarily just one. Some employees who are on Transit Remanufacturing payroll are working for Duke City and vice versa.

Now, we have here two competing businesses in Winslow, competitors, and I have learned that in the lumber business the competition is quite keen. The evidence has disclosed [33] that things that they want, that they ask for in depositions which are refused to produce, and that they ask for here requires opening books which applied to business operations which are not the property involved. They ask here for these records, for example, to show the exact cost of operation at Winslow. The testimony is that selling costs and general administration costs are not allocated, in order to allocate those it would take, the comptroller told me, two or three weeks or maybe more of study, and then it's more or less of an arbitrary location. They ask here for the production of records showing the total number of feet of each grade of lumber sold that was up there. Now, if this was a single plant and a single operation, those records would be available, but they are not. They are mingled in with all these others. And I think that before we can consider even the measure of damages or the rule or what books they are entitled to, the question of liability has to be determined.

Now, I know it is discretionary with your Honor, and I haven't prepared a formal motion, but I want to suggest, I mentioned it to Mr. Romley just casually, I want to suggest that it would save untold effort and time for the Court, parties, witnesses and counsel to try the case on liability. And if the Court determines that we are liable, the

Court will then know pretty much what the measure of damages would be applied and at that time we then will produce all the records [34] we have got that are material or relevant and go into it. Now that may sound kind of foolish, it did to me at first until I talked to an accountant or two that have worked on it.

For example, there is a certain amount of lumber that is milled and planed at Winslow that is shipped over to Albuquerque. It is invoiced with a lot of other lumber that comes into Transit Remanufacturing from these other mills, and to get accurate information they have got to sit down with each of those invoices and trace them out.

The Court: In other words, you want to try the question of was there a contract, was it breached?

Mr. Moore: Try the liability question. I think that will save everybody a lot of time and a lot of expense, because then we are defined, our issues are clear. My understanding of the rule, there are two or three cases on it.

(Discussion off the record.)

The Court: What do you think about it?

Mr. Romley: Rex proposed it to me, oh, some two or three weeks ago, and I told him it didn't appeal to me, but that I would consider it, and I did, and I discussed it with Mr. Cox and Mr. Robbins and Mr. Killingsworth in our office who likewise has done some work on this case. We concluded that this was not a proper case for a sever-

ance of the issues, I don't see anything that can be accomplished. Rex says that a lot of time and effort can be saved. I think that's in the [35] false hope, premise that there is no liability.

Mr. Moore: No, not that. I very frankly say that I feel there is no liability, but I wasn't going to come before this Court and say you have no lawsuit, don't waste your time. I don't mean that, that's not my attitude. But to boil it down, if there is liability to boil it down as to what is the measure of damages and what evidence would be material or relevant to that issue, then we will put accountants on our books, if the Court sees that's the measure, and that's what it wants to know and dig it out. It is a physical impossibility to get some of this information, I think, complete even before trial time. They can make some estimates and guesses and so forth. Now, Mr. Romley very graciously yesterday, and the Court will see it in the deposition, day before yesterday, when he said I was obstinate that he very graciously agreed to let us look at Nagel's books for ten years.

Mr. Romley: I did, and that still goes. You can see everything in our books.

Mr. Moore: I am not interested in Nagel's books, and furthermore, your Honor, there are trade secrets, there are business secrets that show up, brokers, dealers, arrangements that show up in these books, and I am sure Nagel's books, that for example if there isn't any liability here it is none of their business, in just plain talk, and it is none

of our business what is in Nagel's books if it develops that their [36] operation is admissible evidence until we get to that point.

Mr. Romley: Well, most of them or many of these matters that we have sought an order requiring you to produce are matters that we did not even know were in existence until day before yesterday, and when both Mr. Weinstein and Mr. Cavanaugh testified that you have monthly statements of the Winslow operation showing your costs in the Winslow operation.

Mr. Moore: With arbitrary allocations only.

Mr. Romley: With arbitrary allocations only of the \$5 per thousand feet.

Mr. Moore: And selling costs.

Mr. Romley: Of the general administrative costs, everything else he had complete.

Mr. Moore: Not selling.

Mr. Romley: You instructed him not to answer, and it left me with no alternative. That's why we have a late motion. Had he answered those things or had he produced those things there so I could cross examine him about it, we would not have a motion to produce these documents.

The Court: As far as the time is concerned this thing has been set for months, and I frankly don't think it is timely to be getting your damage evidence in the last minute on January 29th, and on yesterday. I mean so many of the things that are asked for, "Do they exist? And if they do, what do

they have to do with this case?" You are just [37] going to have to kind of shoot in the dark with this thing.

(Discussion off the record.)

The Court: For instance, the interrogatories as I glanced through them earlier today, "Submit a copy of it," or something. Well, you don't do that on interrogatories.

Mr. Moore: That's right, we object on that grounds.

The Court: "Make copies of this and produce it." You just don't do that under the rules as I understand them, and if depositions were taken and then a motion to inspect the books and under the thing, why, we could have had this thing in an orderly fashion. But I will do the best I can with it. I am just going to, at the same time that I rule on the interrogatories and on the motion for production, I will tell you. I don't mean that I am going to cut you off from an opportunity to make any further objections that you want for these motions for production. But when I rule on the motion and the interrogatories I will also determine whether or not to try the question of contract and breach, and the matter of damages, or whether to go ahead on the whole thing. I prefer to do it all at one time, but the only thing that I don't have any way of working this thing out.

(Discussion off the record.)

Mr. Moore: You see, your Honor, another thing that doesn't show up on these documents that complicates this situation on the records and all, he

asked for reports and [38] records, on a milling contract, that our people had with the Gallagher companies from 1957, I believe it was, up to the time they sold it. I don't know, but I am certain that it would take a lot of time to dig that information out if it is available.

Mr. Romley: Fourteen months of that contract.

Mr. Moore: There is lots of board going through there, and there is lots of detail, and I am sure Mr. Cox knows much better than I do. And when you have got to segregate and try to intelligently figure out what part of this on the overall picture is allocated over here, it is complete guess work, and if it comes to that where we have to do that, we want to do it with the utmost accuracy.

The Court: This agreement between the defendant and as to the Winslow or the Arizona Timber Company, is that what is meant by November 6th, 1958?

Mr. Romley: That is correct, that is the sale agreement whereby the defendants purchased.

Mr. Moore: And they took over the operation in various stages after that, and it probably would entail a checking of records of Arizona Timber on what had been cut out of certain areas and our records what is cut out of certain areas, I mean there is a lot of details, detailed analysis of a lot of books.

The Court: Do you have any further objections or any [39] more specific objections as to this motion for production?

Mr. Moore: In connection with the ultimate measure of damages, your Honor, the contract of purchase was November 6th, '58.

Now, they asked for records, Mr. Pfister just pointed out, of a lot of things that existed in November, '58, and I think some of them in September, '58. They didn't attempt to exercise their option until February, March, whatever date it was. Now the interpretation of that agreement, if it is an agreement, would determine whether there is any relevancy in what available timber there was in November or what available timber there was in February, it would determine the relevancy of sales of lumber from November up to February. It just seems to me there are so many uncertainties and I don't think it is proper to just say, "We will put you on a fishing expedition in the books of your competitor." Neither do I think that we should be put on a fishing expedition into our competitors' books. Once the thing is determined and then if we are liable and we owe money, then we can define exactly what records there are and get them.

If I ever saw a case, your Honor, where I felt that you were justified in taking two bites at it, this is it.

Mr. Romley: May I say this with regard to looking at competitors' records, and I mean no disrespect to counsel when I say this. But if there were any merit one competitor [40] should not look at another's books, or if any harm could come

to him, I would not have invited him to examine our records for the past ten years. I think that speaks for itself. I don't think there is any merit.

The Court: There isn't any place for examining yours, I mean as far as I can see they are not concerned with what you have done in the past.

Mr. Romley: I think they may be material, your Honor.

The Court: Of course on damages, they are a pretty broad scope, and I would think offhand it would be pretty remote where Nagels—

Mr. Romley: We will show what we would have made had this contract been performed.

(Discussion off the record.)

The Court: But I will pass on that when I rule on the motion and the objection to the interrogatories.

Mr. Romley: May I suggest one more matter for consideration at this pre-trial, your Honor?

I would like to suggest to the Court, and of course I don't know whether the first defense alleged in the original answer will be incorporated in the amended answer, I imagine it is. If so, I think we should probably dispose of that and not waste time in the trial on it, or take time in the trial. Failure to state a claim which normally we incorporate in a motion to dismiss, but can put in an answer [41] as you did.

Mr. Moore: I certainly don't waive it, but we can argue it as a motion at the end of the evidence.

Mr. Romley: I mean does it go to the pleadings or the evidence? If it goes to the pleadings I think it is a proper matter to be considered at the pre-trial.

Mr. Moore: No, I think this about it: That as far as your pleadings are concerned, other than your letter and that is what you base it on, that is what I had in mind, that there is no enforceable agreement there. Now, certainly there would be some evidence admitted to explain some ambiguities which might correct that, I think it is just go ahead.

Mr. Romley: The defense is directed to evidence rather than pleadings?

Mr. Moore: Primarily that, primarily to the fact that you haven't pleaded a legal agreement, but you have got the agreement and if it can be, evidence will take care of it.

Mr. Romley: I merely suggest it as a proper matter to be disposed of now.

The Court: Counsel indicates that as far as urging it is concerned, he will do it at the conclusion of the evidence. And I guess it is not in the normal motion, so there is nothing I could do on it anyway. He set it in there as a grounds of defense.

Mr. Romley: I merely thought this, your Honor: [42] He says that the complaint fails to state a claim upon which relief can be granted as against these defendants or any of them, which is the same

thing as saying a motion to dismiss, and if there is any particular technical defect in the pleadings, why——

The Court: If you want it heard before the trial you put it in as a motion, if you do it this way it is only, as I have always construed it, done this way, a kind of a signal to the Court that you are not agreeing that there is a cause of action stated, but you don't propose to raise any point on it until after on the trial. Do you have any exhibits here?

(Discussion off the record.)

Mr. Moore: Since we are short of time, will you retain our oral argument on this production and will you relieve me of filing written objections?

The Court: Yes, I will pass them over the week-end and then have the clerk notify you.

Mr. Moore: The one thing I want to make clear on that production, your Honor, and so forth, and on fixing damages, they are going into this milling contract as well as a pooling contract that existed between the defendants and Arizona Timber before the defendants bought the place. And there are lots and lots and lots of lumber went through that mill under that pooling agreement, and under that milling contract. And they want records on that. I can't see that that's material or [43] relevant to the issue because in effect there is a merger, and that milling contract is out the window.

Mr. Romley: Your Honor, we have a Therma-fax copy of the September 12th proposal from Gallagher to Liberman, and signed by Liberman.

That was presented to us by the defendants. We would offer that in evidence. Is there any objection to this?

Mr. Moore: None.

The Court: It is stipulated then that what is marked in the penciled one may be marked in evidence on the trial. Do you have any others?

Mr. Romley: We would like to offer a photostat of the telegram of October 16th.

(Discussion off the record.)

Mr. Romley: I have marked October 16th at the top there.

Mr. Moore: Yes.

The Court: Well, then, I will mark that two with a pencil.

How about that Exhibit A, have you got a copy of that?

Mr. Romley: Here is a copy of it, a photostatic copy.

Mr. Moore: Yes.

The Court: That will be 3.

Mr. Romley: I think that is all we have to offer at this time, your Honor. [44]

(Discussion off the record.)

The Court: Is that all one exhibit?

Mr. Romley: This is all one exhibit, your Honor. This is the November 6th agreement.

Mr. Moore: This is the milling agreement with the supplements attached and this is the pooling agreement.

(Discussion off the record.)

Mr. Moore: Here is a copy of the milling agreement with three supplements.

Mr. Robbins: One copy we have somewhere along the line showed a couple more.

Mr. Moore: All I have shows three. May we mark this with the understanding that if this isn't all of them we can substitute?

Mr. Romley: It's entirely agreeable.

(Discussion off the record.)

The Court: If you get a better one and want to substitute it on the trial you can do that, but this just will give me background and expedite the question of admissibility.

I will mark that 4.

And then I am told that this and this relate to the——

Mr. Romley: This agreement dated July 30th, 1957, is the pooling agreement as we have referred to it between—or milling, I forget which. [45]

Mr. Moore: Pooling, the other is the milling.

Mr. Romley: Between Liberman, Duke City and the Arizona Timber. Then are these appended to that agreement?

Mr. Moore: That is the milling agreement.

The Court: Some supplements if there be others?

Mr. Moore: There are three attached to it which I assumed are all of them.

Mr. Robbins: There are a couple more.

Mr. Romley: August 9th letter from Gallagher to the Arizona Lumber Company to Liberman with supplement number one, supplement number two and supplement number three attached.

The Court: May these go in as five and six, is that agreeable?

Mr. Moore: Yes, that is agreeable.

The Court: And with the understanding if there are any more supplements to 5, they may be at least on the trial.

(Discussion off the record.)

Mr. Romley: We have a map that is being prepared, it was supposed to be air mailed to us here, it was to be air mailed here.

Mr. Moore: I have one that is marked up, marked with color, which may or may not be material. It might be helpful.

(Discussion off the record.)

Mr. Romley: May I inquire, will a map be of any aid to the Court before the trial? [46]

The Court: Probably not.

Mr. Romley: If not, let's discuss this and look at it and see how it compares with ours. I will say this, we probably will not require any further proof on it on your avowal as to what it shows, and I won't require any further proof.

Mr. Moore: I won't avow as to what it shows, I will ask Mr. Weinstein to tell me what it shows and then ask him to avow.

The Court: Did you say you had something else?

Mr. Romley: Well, do you have an extra copy of the September 11th, the original draft of the Gallagher-Liberman?

Mr. Moore: I don't.

Mr. Romley: I have one and I don't have a copy, and I am going to need it. So if I may, I'd like to present it later, your Honor, make another copy of it.

The Court: Fine. The map business you will settle amongst yourselves?

Mr. Romley: Yes.

(Discussion off the record.)

Mr. Moore: Judge, I want to really emphasize my thinking with you on this separation of issues as to clarifying this thing and shortening it.

The Court: Well, fundamentally I like to do it at one sitting, I think everybody does. But this is not the [47] ordinary situation, at least I am going to think about it after I have a chance to study the other thing, I mean in the light of the particular features of this case. Ordinarily I am opposed to splitting it up.

Mr. Moore: Ordinarily I am. This is the second time in my life that I have ever suggested it.

(Discussion off the record.)

Mr. Moore: I might ask one other question, your Honor, if I may. Mr. Romley, I think this might clarify some of the records and books that we are asked for and they are asking for and a basis for objection, do you mind, Mr. Romley, telling us, if you establish liability at what date you contend your right to damages accrued? By that I mean as of the date our people got it or as of the date that you attempted to exercise your option.

Mr. Romley: We started attempting to get the information immediately after you bought it, and didn't get it for two or three months, and consequently couldn't tell you anything in regards to the exercise of our option. For that reason I can't answer you directly.

(Discussion off the record.)

The Court: Of course, when you get into damages it is pretty hard. In other words, if there are records even before you bought it and they would bear on the cost of the mill, I mean whether it was an efficiently operating mill or [48] inefficient operating mill, and whether its capacity and everything, records that would show that would probably be admissible even though the damages themselves might flow from a different period. But I mean you have a very broad picture on damages if you get into it. About all that they say, that the cases say, is that you be sure that there are damages in fact, and then you can put in most anything to show the amount. I mean it's very, very broad on the thing. But I will pass on the whole thing as soon as I get a chance.

(Discussion off the record.)

The Court: Is there a dispute whether the letter of September 23rd means just the mill or the mill and timber, do you disagree on that?

Mr. Romley: We contend our agreement related to the mill and timber, the mill is no good without the standing timber.

Mr. Moore: I can't agree that that is right, but I have been confused and tried to straighten it out in my own mind. But I think that actually what was discussed and dealt with was the mill itself, because whether it will be admissible evidence, and if this is improper, why, we will forget it. There had been negotiations by Gallagher just on the mill—period. And he would sell the timber to people down at Payson just as accessible practically excepting the rim, being closer in miles than Winslow to this Working Circle. And in September, [49] the 12th, in the proposal they are separated entirely, the one deal but they are separate.

Mr. Cox: They are itemized separately.

Mr. Moore: Well, first they discuss the plant and what it means and what its price is and so forth, then they talk about the other. So that actually I think that technically it means just the plant—period. As I say, it's—

Mr. Romley: That is going to be a fact question, your Honor.

(Whereupon the pre-trial conference came to a close at approximately 3:45 o'clock p.m.) [50]

[Endorsed]: Filed February 9, 1960.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

May 3, 1960

Tucson, Arizona

Appearances: Messrs. Moore & Romley and Mr. James J. Cox, Jr., for the Plaintiff. Jennings, Strouss, Salmon & Trask, by Mr. Rex H. Moore, for the Defendants. [1]

The above entitled matter came regularly on for hearing at Tucson, Arizona, on the 3rd day of May, 1960, before the Honorable James A. Walsh, Judge of the United States District Court, and the following proceedings were had to-wit:

The Court: Proceed.

Mr. Romley: If the Court pleases, the plaintiffs are ready.

Mr. Moore: The defendants are ready, if the Court pleases.

The Court: Mr. Romley, do you have a trial memorandum?

Mr. Romley: We do not have one typed, your Honor. We can present one in the morning, I'm sure.

The Court: I don't insist on one, but I thought I'd ask if you do have one.

Mr. Romley: We have started the preparation, but it hasn't been concluded. It's typed in rough draft, we will have it.

Mr. Moore: If the Court please, at the pretrial conference it is my recollection that the milling contract which we call it, the August 9th, 1957 agreement between Arizona Timber Company and Duke City Lumber Company, there were in fact five supplements. We only had three, and I believe that I was to supply supplement number 4 and number 5. You have copies of them, Mr. Romley; Mr. Robbins is the one that corrected me [2] at the time and said he had copies of them. But I didn't have. And those are reproduced copies.

Mr. Romley: We have no objection, if the Court pleases, to these being received in the same manner as the others were.

Mr. Moore: It will just be simply attached to that exhibit, it's the August 9th, 1957 agreement.

The Court: Could you identify it, Mr. Moore, and then the Clerk will attach it.

Mr. Romley: Was not the agreement originally July 31st and these are addendums or supplements?

Mr. Moore: No, it is the one that was marked in pencil as number 5 and there are supplements number 1, 2, and 3 attached to it, Mr. Romley. Four and 5 we didn't have at the time, and I would think it would be well just to attach these to that.

The Court: It will be and it will be part of 5 in evidence then.

Mr. Moore: Now, there is one other matter that I need to file, your Honor. In our answers to the interrogatories in the schedule answering Interrogatory Number 40, there was a mathematical mistake. We have corrected that, prepared another schedule.

I telephoned Mr. Robbins and gave him the corrections and have given counsel a copy of that corrected schedule. We would like to substitute this one for the schedule in the answers to the interrogatories because there was a mistake in [3] that one and this is correct. In addition to that—

Mr. Romley: May I say as to the first matter, your Honor, because there is a different situation prevailing with regard to the second, we have no objection to that being attached or substituted for the original.

Mr. Moore: Now in addition to that we have prepared a schedule answering Interrogatory Number 40 which brings the matter up to March 31st, 1960, instead of December 31st, 1959. And I would like to attach that as a part of the answers.

If you have any objection, of course, we can offer it later.

Mr. Romley: We were furnished a copy of this latter document this morning, your Honor. We haven't had an opportunity to read it. These are being only attached and not received in evidence. That's correct, is it not?

Because the answers to the interrogatories as such are not in evidence.

Mr. Moore: All right. Well, we will just withhold this.

Mr. Romley: They are attached only, then such parts thereof as may be read in evidence or may be offered in evidence can be considered. But the mere attaching will not receive it in evidence.

Mr. Moore: We will withhold the subsequent one at this time and substitute the corrected schedule. [4]

The Court: May I see that?

Mr. Moore: The mistake, your Honor, was simply a mistake in division and one of the pages on one of the items, and this new one corrects that and carries it then on through to the ultimate figure.

The Court: The Clerk will attach it to the answers which is file document 19, and so that we will have both the original and the corrected one as a part of the answers.

Mr. Romley: If the Court please, we discussed with counsel this morning the matter of offering in evidence a number, nine as a matter of fact, report of examinations prepared by certified public accountants of the Nagel Lumber and Timber Company operation, starting with the year 1952 and ending with the year 1959.

In 1957, there are two of them, one dated September 30th, 1957, which was the end of the proprietorship operation, and the other ending December 31st, 1957.

As of October 1st, 1957, there was a partnership consisting of the plaintiffs in this case and that's why there are two for the year '57.

We have handed to the Clerk photocopies and counsel some time ago, several weeks ago, was furnished copies of these also.

Mr. Moore: Not of '52 and '53, Mr. Romley. The first one that was furnished to us was for the year ending [5] December 31st, 1954.

Mr. Romley: '52 and '53 were not furnished to you?

Mr. Moore: No.

Mr. Romley: We will furnish them now. I thought you had been furnished them. We went back and got them for every year there has been an audited report. These, if the Court pleases, we ask be marked now for identification as 7-1 through 7-9 in that order. Counsel, if I understand him correctly, has made no objection as to the foundation. He says he does have other objections as to their admissibility. If they may be so marked we offer them in evidence, it being conceded that the foundation has been laid.

Am I correct in that?

The Court: The Clerk will mark them 7-A, T-B, and so on.

Mr. Romley: That is agreeable, your Honor.

The Court: It will be the 7 series.

(Plaintiffs' Exhibits 7-A through 7-I marked for identification.)

Mr. Moore: Insofar as the identification of them is concerned, your Honor, we do not object. We do object to their admissibility in evidence on several grounds. First, there is no foundation shown in the lawsuit that the material contained in those financial reports are material to any issue in this case. [6]

Certainly evidence as to earnings of the plaintiffs' business operations are not admissible until, if at all, a prima facie case of liability has been made.

Second, we object to the admissibility of their statements as not a proper test upon which to base an award of future—loss of future prospective profits, and object on the ground that the evidence in this case will not show a legal foundation upon which to base an award for the loss of future prospective profits.

Certainly they are not admissible at this time until the foundation has been laid with respect to the prima facie liability and other matters.

The Court: There is no foundation for them at the present time and on that basis the objection is sustained for the present.

Mr. Romley: Your Honor means with regard to foundation other than the proper preparation from the books and records?

The Court: I don't understand counsel for the defendants to object to that they are not what they purport to be, the records or the reports made in the regular course of business by certified public accountants.

Mr. Moore: We understand, your Honor, that they are the annual reports prepared by Mr. James A. Smith and others, certified public accountants, and we do not object to them on [7] the ground that they do not purport to show what they do show, or that they are not correct insofar as the accountants' analysis of the records were concerned.

The Court: Their relevancy and materiality are not established at the present time.

Mr. Romley: May we proceed, your Honor?

The Court: Yes.

Mr. Romley: Mrs. Nagel, will you step forward and be sworn, please. [8]

MRS. GEORGE. H. NAGEL

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Will you state your name, please?

A. Mrs. George H. Nagel.

Q. Where do you live, Mrs. Nagel?

A. Winslow, Arizona.

Q. How long have you lived at Winslow?

A. Seventeen years.

Q. You are married? A. Yes, sir.

Q. Your husband's name?

A. George H. Nagel.

Q. You are one of the plaintiffs in this action, are you not? A. Yes, sir.

Q. George H. Nagel is also a plaintiff, your husband? A. Yes, sir.

Q. He is not present in court?

A. No, sir.

Q. Robert T. Jenkins also is a plaintiff?

A. Yes, sir. [9]

(Testimony of Mrs. George H. Nagel.)

Q. I believe he is your son-in-law?

A. Yes, sir.

Q. He is present? A. Yes, sir.

Q. Georgia Mae Jenkins, another plaintiff, is your daughter? A. Yes, sir.

Q. She is not present? A. No, sir.

Q. And the last plaintiff is James Henry Nagel?

A. Yes, sir.

Q. He is your son? A. Yes, sir.

Q. Also not present? A. Not present.

Q. Do the five of you that I have just enumerated, Mrs. Nagel, engage in any business?

A. Yes, sir.

Q. What is the name of that business?

A. Nagel Lumber & Timber Company.

Q. In what capacity are the five of you associated in that business? A. Partnership.

Q. How long has that partnership existed?

A. That partnership has existed since 1957. [10]

Q. Do you recall what month it commenced?

A. The beginning of October, I believe.

Q. October 1, 1957? A. Yes, sir.

Q. Is there any reason why the other three partners are not present, Mrs. Nagel? A. Yes, sir.

Q. Will you tell us please, what that reason is?

A. James Henry Nagel was a minor, he is in school. Georgia Jenkins——

Q. Georgia Mae Jenkins?

(Testimony of Mrs. George H. Nagel.)

A. Georgia Mae Jenkins is trustee for James Henry. She is not real active in the business. And George H. Nagel is a semi-invalid.

Q. Is George Henry Nagel, your husband, active in the business? A. Yes, sir.

Q. Are the three absent partners all in Winslow?

A. Yes, sir.

Q. Do they reside there? A. Yes, sir.

Q. Mrs. Nagel, prior to October 1, 1957, when the partnership was formed, was there a business known as the Nagel Lumber & Timber Company?

A. Yes, sir. [11]

Q. Who were the owners and operators of that business—I am speaking now prior to the organization of the partnership?

A. George A. Nagel and Mabel Nagel.

Q. You and your husband? A. Yes, sir.

Q. When did you first commence doing business in Winslow? A. November, 1942.

Q. That is in the capacity you have stated, the Nagel Lumber & Timber Company, yourself and your husband? A. Yes, sir.

Q. Did you operate and do business continuously, you and your husband, from November, 1942, through September, 1957? A. Yes, sir.

Q. Were there any other owners in the business at that time? A. No, sir.

Q. What is the nature or character of the business in which you were then engaged, Mrs. Nagel?

A. Same as now, lumber manufacturing and sales.

(Testimony of Mrs. George H. Nagel.)

Q. Will you tell us what you own and owned at that time in connection with the operation of the business, in other words, the mill and so [12] forth?

A. At that time we had a mill. We didn't have the planing mill and trucks, we just had the mill and timber contracts at the beginning.

Q. What was the source of your timber supply in the beginning?

A. Sitgreaves National Forest.

Q. How did you obtain timber from that source?

A. By bidding.

Q. Who was the owner of the timber?

A. U. S. Forest Service.

Q. You obtained the timber by contract with the U. S. Forest Service? A. Yes, sir.

Q. From what forest was the timber obtained?

A. Sitgreaves.

Q. Sitgreaves National Forest?

A. Yes, sir.

Q. Where is that located with reference to Winslow? A. Just south.

Q. Your mill is located in Winslow proper?

A. Yes, sir.

Q. How many mills are there operating now at Winslow? A. Two.

Q. Yours continuously from November, 1942?

A. Yes, sir. [13]

Q. And the second mill from what date?

A. Well, sir, I think it is approximately 1950.

(Testimony of Mrs. George H. Nagel.)

Q. Where is the second mill located with reference to yours? A. Southwest, I believe.

Q. Is it miles away? A. Very near.

Q. Does it adjoin or separated by any distance?

A. It adjoins our land, their land does. The land we have secured since it did adjoin just the corners, but now it is adjoined side by side.

Q. Do you know who it was that started the operation of the second mill in about 1950 that you have told us?

A. The Gallagher interests.

Q. Do you know who was connected or involved in the Gallagher interests?

A. The Gallaghers and Kaplans, I believe.

Q. Do you know their initials?

A. T. P. Gallagher, I don't know whether he puts a Junior or not, T. P. Gallagher, his father, was deceased at that time, and A. I. Kaplan.

Q. Do you know how long Gallagher and Kaplan operated the second mill?

A. Yes, sir.

Q. Until what date? [14]

A. Until 1959 when it was turned over to Duke City Lumber Company.

Q. Will you tell us briefly, Mrs. Nagel, the procedure involved in processing or manufacturing the lumber, from the time you obtained the timber under contract through its final processing stage?

(Testimony of Mrs. George H. Nagel.)

A. The first thing after you get a contract is a bond or put up cash so that the Government will be secured, and then the timber is through selective cutting so the Forest Service marks the trees for the operator and we cut those trees and our process was to haul them to Winslow and saw them into boards. At the beginning we sold the boards rough, then later we had a planing mill and finished them, and later we had a dry kiln, we dried what they call the uppers and higher grades and finished them through the planer and shipped them to customers, sometimes through wholesalers and sometimes through our own sales direct.

Q. You referred to the second mill, the Gallagher-Kaplan mill as being in operation by those two gentlemen from 1950 approximately until it was transferred in 1959, I believe you said, to Duke City?

A. It was operated by them in the Forest earlier than that. I don't know how many years, but they were there, they bought—the Whiting's first bid the sale in and Whiting sold to the Gallagher interest and I don't know what [15] year, but it was early in the time the mills began operation. Then the mill was abandoned in the forest and the mill in Winslow was built, I believe it was moved from Grants by the Gallagher interests.

Q. It was moved in about 1950?

A. I think so. It might have been '51, but it was in that—I think.

(Testimony of Mrs. George H. Nagel.)

Q. Mrs. Nagel, can you tell the Court whether the second mill, from 1950 until it was transferred to Duke City was operated in a manner similar to yours or in a different manner; if it did differ, tell us the respects in which it did differ.

A. At times we contracted the logging operation, just a part of it, and at times, I think most of the time they contracted just skidding and logging, cutting, skidding and logging and hauled the logs themselves on their own trucks.

Q. So far as the actual manufacture of timber into lumber, were these two operations similar or otherwise?

A. They were very similar. In fact, almost exactly the same, I would say.

Q. Was the production of timber during those years 1950 or '51 through the year 1958 at the two mills substantially the same quantities or otherwise?

A. Yes, sir, I think they were at that time.

Q. You mean they were substantially similar?

A. The same. [16]

Q. You have related some things now with regard to the operation and similarity of these two mills. Is that based on any personal experience or what has been related to you so far as your mill is concerned?

A. We have compared statements, cost statements.

Q. With whom?

A. With Mr. Tom Gallagher.

(Testimony of Mrs. George H. Nagel.)

Q. He is the same T. P. Gallagher you previously referred to? A. Yes, sir.

Q. Mrs. Nagel, I neglected to ask you earlier the extent in which you participate in the operation of the Nagel Lumber & Timber Company—hereafter I will call it the Nagel mill.

A. I manage it, sir.

Q. How long have you managed it?

A. I would say since 1951 for sure and it was practically my management during the year 1950.

Q. Have you managed it continuously since that time? A. Yes, sir.

Q. Have you performed the usual duties incident to the management of such a mill?

A. Yes, sir.

Q. Prior to 1950 or '51 who was the manager of the mill? [17] A. Mr. Nagel.

Q. When did he—that was from its inception in November, 1942? A. Yes, sir.

Q. Until what date?

A. Well, he was partially out of the management after June 6th, 1950 and then totally out after September 29, 1951.

Q. And after those dates then you became the active manager? A. Yes, sir.

Q. Was there a reason why he ceased to be the manager? A. Yes, sir.

Q. Tell us what occurred?

A. Well, he had a stroke in 1950 that partially disabled him and in 1951 that totally disabled him.

(Testimony of Mrs. George H. Nagel.)

Q. Has he been totally disabled since September 29, 1951? A. Yes, sir.

Q. Have you been assisted in your duties as manager by any person or persons since you took over the full management position in September, 1951? A. Yes, sir. [18]

Q. (By Mr. Romley): And who are those who have served in that capacity, would you say they are assistant managers? A. Yes.

Q. Who has been the assistant managers?

A. George M. Brown, Robert T. Jenkins.

Q. When was George T. Brown the assistant manager?

A. George M. Brown was assistant manager, I can't be sure what—when he first came there he was not well enough acquainted with the business to be assistant manager. But he really did take hold well and I can't remember exactly when I made him assistant, but I would say probably '52 or maybe '53, I am not sure.

Q. And how long did he continue in that capacity? A. Until '55.

Q. I see. And since '55 have you had an assistant manager? A. Yes, Sir.

Q. And who has that person been?

A. Well, Bob has been most of the time. He was not at first, but—

Q. When you speak of Bob, you mean Robert T. Jenkins? A. Robert T. Jenkins, yes.

(Testimony of Mrs. George H. Nagel.)

Q. Mrs. Nagel, did you ever—strike that, please. You, of course, knew Tom Gallagher?

A. Yes, sir. [19]

Q. Did you know A. I. Kaplan also?

A. I have met Mr. Kaplan, I was not too well acquainted with him but I knew him. Mr. Nagel knew him, I believe, better than I did. But I did know him.

Q. Do you know where these two gentlemen lived?

A. Mr. Gallagher lived in Albuquerque and Mr. Kaplan in New York City.

Q. Mr. Gallagher still lives in Albuquerque?

A. Yes, sir.

Q. And I believe Mr. Kaplan is now deceased?

A. He is deceased, yes, sir.

Q. Did you ever have any understanding or agreement of any kind, Mrs. Nagel, with the Kaplan-Gallagher group or, I might say, with Kaplan-Gallagher Mill there in Winslow with regard to any proposed or contemplated purchase or sale of your respective properties?

Mr. Moore: We object to the question as calling for a legal conclusion and until the foundation is laid to show whether it was in writing or oral, we object to it on that ground.

Mr. Romley: I first wish to inquire if there was one, your Honor, and then I will get into that.

The Court: Well, she would have to characterize it as an understanding.

Mr. Romley: I will rephrase the question. [20]

(Testimony of Mrs. George H. Nagel.)

The Court: Very well.

Q. (By Mr. Romley): Was there ever at any time, Mrs. Nagel, any understanding between you and—I will refer to the Gallagher-Kaplan interest as Gallagher in the interest of simplicity and brevity here—with regard to the purchase or sale of your respective properties?

Just, please, yes or no.

A. Yes, sir.

Q. Was that an oral or a written understanding?

A. It was oral.

Q. When was that understanding first reached?

A. I can't be sure, sir.

Q. Well, you can't be sure now—

A. As to the exact date.

Q. As to the exact time?

A. Exact time, no, sir.

Q. Now, with reference to September, 1958, can you tell us if it was in existence at that time?

A. Yes, sir.

Q. Can you tell us for approximately how long prior to that date it had been in existence?

A. Sir, I think that it had been in existence since soon after they built the mill in Winslow.

Q. How was that understanding reached?

Mr. Moore: Now, your Honor, may I ask one question on [21] voir dire?

The Court: Very well.

(Testimony of Mrs. George H. Nagel.)

Mr. Moore: Mrs. Nagel, the property involved that represented the Gallagher Mill in Winslow was real estate, was it not? The building is built upon real estate there that they own?

A. Yes, they leased it for 99 years, I believe.

Mr. Moore: We object to any further interrogation with respect to the oral agreement because it would not be a legal, binding agreement and not admissible.

The Court: Objection will be overruled. I don't mean that there may not be something to your point, but I don't think it's any reason for keeping it out. I mean even if it was only a moral obligation if the other party to it was going to carry it out, then it might furnish consideration for an agreement, even though absolutely unenforceable.

So the objection is overruled.

Q. (By Mr. Romley): Do you have the question in mind, Mrs. Nagel, or would you like it read to you? A. I would like it read, please.

(Whereupon, the pending question was read by the reporter.)

A. It was just an agreement that we made with one another.

Q. Well, I'm trying to find out—perhaps my question [22] isn't too clear—who was it that made the—who reached this understanding?

A. T. P. Gallagher.

Q. Who else, and you? A. Yes.

Q. All right. Now, will you tell us, please, just what that understanding was?

(Testimony of Mrs. George H. Nagel.)

A. The understanding between us was that, should we decide to sell our mill we would first offer it to the T. P. Gallagher interest, and should they decide to sell, they would first offer it to us.

It would be until—we called it the right of first refusal. I think that was Mr. Gallagher's term. But that's the way we always referred to it, the right of first refusal.

Q. Now, there will be some reference later in the testimony to an agreement reached with the Duke City Lumber Company through Mr. Maurice Liberman, one of the partners, as having been entered into on September 20th and evidenced by a written memorandum which is in evidence here dated September 23rd, 1958. Will you tell us, Mrs. Nagel, if the right of first refusal about which you have testified continued in existence from the time it was made until at least September 23rd, 1958?

A. It continued in existence longer than that, until we did tell Mr. Gallagher that we were refusing—giving our—exercising [23] our right of first refusal.

Q. That you were giving up your exercising your right? A. Yes, yes.

Q. And do you remember when it was that that took place?

A. It was on Tuesday after—it was the 23rd, I guess, the 23rd.

Q. The 23rd of September?

A. Of September, yes.

(Testimony of Mrs. George H. Nagel.)

Q. Mrs. Nagel, did you ever carry on any negotiations in the year 1958 looking toward the purchase of the Gallagher Mill?

A. Yes, sir.

Q. With whom were those negotiations carried on?

A. With T. P. Gallagher.

Q. How did they come about, was it your desire to purchase initially or was it their desire to sell?

A. Their desire to sell.

Q. Tell us what occurred, when it was and where it was that there were discussions on that subject?

A. He called me over the telephone and told me that——

Q. You are speaking of—you mean Tom Gallagher?

A. Tom. They had decided to sell the mill, and I asked him what the terms were. And he told me and I took them down and he said he would want to know within 30 days whether we were going to exercise our rights of first refusal. And I told [24] him I'd try to let him know, and I took it under consideration at that time.

Q. Do you recall approximately when it was that he called you?

A. No, sir, I don't know when he called me for sure. I didn't date the notes that I took.

Q. You later had a talk with Mr. Liberman, did you not?

A. Yes, sir.

Q. I believe the evidence will show that was on September 20th, 1958?

A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. Was that during this 30-day period you have mentioned?

A. I'm not sure, sir, but our right to exercise—this right of first refusal was still in effect.

Q. It was still in effect? A. Yes, sir.

Q. Now, did you, on behalf of the partnership, the plaintiffs in this case, do anything more than take the matter under consideration after Tom Gallagher told you of their desire to sell?

A. Yes, sir.

Q. Tell us briefly, please, just what it was that you did in that regard?

A. The first thing I did was, of course, to talk with Bob and then with our accountant. [25]

Q. Now, will you give us the name of your accountant, please? A. Dale Nelson.

Q. He is a regular employee of your firm, is he?

A. Yes, sir.

Q. And a certified public accountant?

A. Yes, sir.

Q. All right, working regularly every day there in the office at Winslow? A. Yes, sir.

Q. All right, I'm sorry for the interruption, You may proceed.

A. I asked Dale to get the details and to figure out how much money would be involved, Tom had said he wanted cash for the mill.

Q. What more did you do other than what you have related, if anything?

(Testimony of Mrs. George H. Nagel.)

A. After Dale had figured about how much cash we would need I went and talked with our banker.

Q. Who was your banker at that time?

A. Valley National Bank is the one I talked with at Phoenix, Mr. McKinney, Ben McKinney.

Q. He was your banker at that time?

A. He was handling our loan at that time.

Q. And is he still? [26] A. Yes, sir.

Q. Did you have the line of credit with the bank at that time? A. Yes, sir.

Q. Had you ever borrowed money from the bank prior to that date? A. Yes, sir.

Q. After talking to Mr. McKinney, did you continue to be interested in the purchase of the Gallagher mill?

A. Yes, sir, we did, I did. And we all were interested in the purchase.

Q. Were you then in position to proceed and consummate the purchase?

A. You mean financially?

Q. Yes. A. Yes, sir, I think we were.

Q. Tell us what that was based on, if it was on the basis of your position and the bank's commitment of whatever it may have been based upon?

A. Well, I would not have known for sure until we complied with the bank's request to project it, project the operation of this mill. And we had made a rough projection, but we had not figured all of the things that were required by the bank.

(Testimony of Mrs. George H. Nagel.)

Q. In your opinion, you were able to proceed though? [27] A. Yes, sir.

Q. Now, did something occur as a result of which you did not proceed with the purchase of the Gallagher mill?

When I say mill, I mean their mill and their physical plant there and timber?

A. Yes, sir.

Q. Tell us what that was.

A. Well, we got what we thought was a better offer.

Q. And from whom did that offer come?

A. Mr. Liberman.

Q. Will you, in your language, please—or perhaps it might be shorter if I be more specific in my question.

When did you and Mr. Gallagher first have any discussion with reference to the purchase or proposed purchase of the Gallagher mill?

I say you and Mr. Liberman.

A. That was September 20th, 1958.

Q. 1958. Where was that discussion and how did it originate?

A. Mr. Liberman came to our office and it was in my office the discussion took place.

Q. In Winslow? A. Yes, sir.

Q. Had you had any conversation shortly prior to that date with Mr. Liberman either in person or by telephone? [28] A. Yes, by telephone.

Q. Do you know how long prior to September 20th that was? A. I'm not sure, sir.

(Testimony of Mrs. George H. Nagel.)

Q. All right. Can you tell us if it was a matter of days, weeks or months?

A. Oh, it was a matter of days. He had made the appointment to come over.

Q. And you say that was by telephone?

A. Yes, sir.

Q. In Winslow or over long distance?

A. Oh, long distance.

Q. You say he had made the appointment to come over? A. Yes, sir.

Q. Who placed that call?

A. Mr Liberman, I believe.

Q. Do you know where he was or if he told you where he was?

A. No, he didn't tell me where he was that I remember.

Q. I beg your pardon?

A. Not that I remember.

Q. Not that you remember. But he did call you long distance and make an appointment to see you? A. Yes, sir.

Q. And was that appointment for September 20th? A. Yes, sir. [29]

Q. To see you in your office at Winslow?

A. To see us, to see me, yes.

Q. All right. Now did he come to Winslow on that day? A. Yes, sir.

Q. Did he meet with you at your office?

A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. Do you remember about what time it was that the discussion commenced and for how long it continued?

A. Well, it was Saturday, I remember that, and still in the morning I believe. But I don't know the exact time.

Q. Do you remember approximately how long the conference lasted, a matter of an hour or two, more than that?

A. I'd say two, two or—two hours or three. Two probably.

Q. Two or three hours, and all the time in your office? A. Yes, sir.

Q. And who was present during all of that time, Mrs Nagel?

A. R. T. Jenkins, or Bob, I will refer to him as Bob.

Q. All right, let's call him Bob, your son-in-law, R. T. Jenkins?

A. Bob and Mr. Liberman and I were present.

Q. Now, will you relate, please, as nearly as you can, the exact words that Mr. Liberman used and you used during that conference and if you don't remember the exact words, [30] the substance of what was said, identifying who said what that time?

Mr. Moore: Just a moment, please, Mrs. Nagel.

Your Honor, we object to the evidence called for by that question for the reason that there is attached to the plaintiffs' amended complaint a written

(Testimony of Mrs. George H. Nagel.)

agreement executed by the parties. It's our position that their claim can be based only upon an alleged breach of that written agreement. Therefore oral conversation with respect to negotiations, et cetera, are not admissible and we object upon that ground.

The Court: The objection is overruled. Certainly they would be admissible as a matter of interpretation, because on its face the agreement, I don't think there is any question that counsel will agree there were ambiguities in it, or matters that you just can't pick up by reading, and understand what the parties meant by the words they used.

So on that basis if no other, it would be admissible.

Mr. Moore: Well, of course my objections may be a little premature at this time, but I wanted to raise it at the first opportunity. We object to oral testimony that would tend to alter, change, modify and so forth the written agreement. Now, may it be understood, in order to save time, that my objection will go to all this line of questioning and I will not have to interrupt the witness? I assume that the Court's ruling is that the plaintiff will be permitted to [31] go into the entire conversation that occurred in Winslow on September 20th.

The Court: Yes, and the record may show a continuing objection to that.

Mr. Moore: Thank you, your Honor.

Q. (By Mr. Romley): Now, do you recall my question? Simply this: Will you relate, please, the conversation that occurred in your office on Sep-

(Testimony of Mrs. George H. Nagel.)

tember 20th, 1958, involving you, Mr. Liberman and Bob Jenkins, using as nearly as you can the exact words, and if not able to do so, then the substance of what was said by each of the parties identifying them as you go along?

A. I'm sure, sir, I couldn't use the exact words. We had—at least I had supposed Mr. Liberman was coming to say that——

Mr. Moore: We object to that, if your Honor please.

Q. (By Mr. Romley): Just a moment, Mrs. Nagel. I think counsel's objection is good. It's not what you supposed Mr. Liberman was coming over to say, we want to know only what the three of you said in that conference, try to give it to us in the chronology in which it came up, please?

A. Well, we discussed, I'm sure, the business or the weather or something preceding our actual conversation regarding the transaction that took place. But I remember that Mr. Liberman said, "Let's buy the mill together." [32]

Q. Mr. Liberman said, "Let's buy the mill together?"

A. Yes. And I asked him if he thought we could get along. I said that that would be the reasonable or the logical thing to do because we each one had an objective to be accomplished. He had his Aztec timber which he wanted to cut on that mill and we would like to, had always since the Az-

(Testimony of Mrs. George H. Nagel.)

tec had disrupted our sustained yield, we had always thought of buying that mill or——

The Court: Is this what you said to him, Mrs. Nagel, or what you were thinking?

A. Oh, I told him that we needed the timber after the Aztec was cut for our mill to make a paying operation.

Q. (By Mr. Romley): I think this, Mrs. Nagel, I probably got the cart before the horse and asked you a question before we laid the foundation of the Aztec timber so that we may understand it better as you go along.

Before we get—or perhaps we can come back to it later and see what you mean by these various terms of Aztec timber and how much of it was under contract, I'm sorry for the interruption. You may continue and tell us what was said.

A. We agreed that——

Q. No, not "we agreed," tell us what was——

A. Well, then we discussed—well, I asked Mr. Liberman if he would be agreeable to Bob managing the mill and he said he would. And as I remember it, he volunteered that after [33] 7 years he would sell the mill to us. Then I'm sure it took lots longer than this, but Bob and I asked to be excused and we left the room and discussed whether or not we would like to accept his proposition and we decided we would.

When we came back into the room we told him that we would like to, but Bob asked him if we could have until April the 30th to complete our pur-

(Testimony of Mrs. George H. Nagel.)

chase and to buy in, and he said that would be perfectly agreeable. Then we agreed that we would put that in the contract.

De also agreed that since Bob would have to come to Albuquerque to exercise our right of first refusal, that they would write the contract in Albuquerque and I told Bob to sign the contract. The contract, we agreed that Mr. Liberman would buy the mill. He told us that he could buy it \$100,000 cheaper than we could, he was sure. We had been offered the mill for \$500,000 cash. That would be \$400,000.

Then when we—when Monday morning came I don't know how we found out whether Mr. Liberman called us or Bob called Mr. Gallagher, but I think Mr. Gallagher was not available Monday so the time of writing this contract was deferred until Tuesday.

Q. And that was September the 23rd?

A. Yes, sir.

Q. Now, have we finished the conversation in your office on September 20th? [34]

A. Oh, I'm sure we don't have everything in. I hope I didn't leave anything out that's important. Of course you always do a lot of talking.

Q. You have told us, Mrs. Nagel, that you think it was Bob who mentioned or asked Mr. Liberman if you could have until April 30th—

A. Well, I'm sure.

Q. —to come in on the purchase?

(Testimony of Mrs. George H. Nagel.)

A. I said that we would have our money tied up in a log deck until April 30th and that log deck would be thawed up and we would have more money available, more cash at that time.

Q. I see. Was that the reason, then, that the subject or the question or the date of April 30th came up?

A. Yes, sir.

Q. And was that the only reason?

A. That's the reason we wanted until April 30th to buy, to have the right to buy in.

Q. And what did Mr. Liberman say when you told him that?

A. He agreed that would be perfectly all right.

Q. Now, you have mentioned a log deck. Tell us what you mean by that, Mrs. Nagel?

A. Well, in the northern part of Arizona there is snows, and you have to put logs in what you call cold deck. It's a storage of logs. You begin decking them after the sap goes [35] down in the Fall and deck them as soon as you can before snows. Then when it snows you are shut out of the woods in many cases, so you have your logs decked and you have your money in the logs that are decked.

Q. In other words, logs stacked or held there?

A. All the costs up to—we call it to the pond.

Q. And when do you start moving or selling these—well, before you do that, of course, you manufacture those logs into lumber, don't you?

A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. And when you do start getting money in for that, what part of the year?

A. We start right away because we have dry kill that dries the upper grades, then that's what the most money is invested in, what you get the most out of.

Q. By what date then generally is it that you are in position, do you have money out of this invested log deck?

A. Well, by April the 30th.

Q. I see. And am I to understand from your testimony that by April 30th you expected to be in better financial position to proceed with buying in?

A. Yes, sir.

Q. And in substance was that what you——

A. Yes, sir.

Q. ——said to Mr. Liberman? [36]

A. Yes, sir.

Q. You made some reference to a statement in the—or statements in this conversation with Mr. Liberman on September 20th, with regard to Bob's managing the new mill, the Gallagher mill if it was purchased?

A. Yes, sir. [37]

Q. Was there anything more said than you have related or have you told us substantially all of that discussion, Mrs. Nagel?

A. We made reference to Mr. Weinstein, I can't remember for sure just exactly how. We asked Mr. Liberman if Mr. Weinstein was working for them, Mr. Weinstein who had been actively managing the production it seemed to us.

(Testimony of Mrs. George H. Nagel.)

Q. For whom? A. For Mr. Gallagher.

Q. Do you remember what response was given, what more was said?

A. As I remember, he said he was not working for him. Anyway—yes, I can't be sure about it, whether he said Mr. Weinstein was working for him at that time or was not working for him at that time, so I can't give you my conclusions.

Q. Can you tell us if the parties did reach an agreement with reference to what part Bob Jenkins would take in the mill?

Mr. Moore: We object to that as calling for a conclusion, if your Honor please, what agreement they reached if any.

The Court: She should tell what was said.

Q. (By Mr. Romley): Tell us what was said in that regard.

A. Bob asked—I asked Mr. Liberman if it would be agreeable for him for Bob to manage the mill, and I believe [38] Bob said to manage the production, but I am not sure about that, sir. But it may have been I just asked him if he would be agreeable to Bob managing the mill and he said he would, I remember that.

Q. Liberman said he would be agreeable?

A. Yes, sir.

Q. You have spoken here of Bob's managing the mill and the purchase of the mill, the Gallagher mill. Tell us what was meant in that regard, you mean the physical plant itself?

(Testimony of Mrs. George H. Nagel.)

Mr. Moore: We object to that as calling for a conclusion, if your Honor please.

A. The deal——

The Court: Just a moment.

Mr. Moore: She is relating conversation now, it calls for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Romley) Was there any discussion at that conference, Mrs. Nagel, with regard to what was to be purchased in connection with this entire transaction? A. Yes, sir.

Q. Tell us just what was said in that regard.

A. We talked about the price of the mill at \$500,000 and the timber had been offered to us at 19.45.

Q. When you say the timber had been offered "to us" at 19.45—— [39]

A. Yes.

Q. ——will you tell us what you mean 19.45?

A. \$19.45 a thousand.

Q. A thousand?

A. Yes, sir. That is the Aztec. And the Forest Service timber at the price it was under contract. There were various prices.

Q. Was there any statement made by Mr. Liberman with regard to the price of the timber to be purchased?

(Testimony of Mrs. George H. Nagel.)

A. Not there. I can't remember that we discussed the price of the timber there. It was later.

Q. Well, when later?

A. When he called me on the phone he told me the price he was paying for the timber.

Q. You mean sometime in October?

A. Yes, sir.

Q. We will get to that a little later. Was there any discussion on September 20 with regard to the amount or quantity of timber that—

A. Yes, sir.

Q. —Gallagher owned or controlled?

A. Yes, sir.

Q. Tell us what the discussion was in that regard, please?

A. We talked about the amounts of Forest Service and how [40] much Aztec there was. I had the notes and I knew that Tom had said that Mr. Lieberman owed him fourteen million feet of Aztec. And the totals of the timber, we must have discussed the amount, I am sure we did.

• Q. You refer to Aztec timber here. Tell us here so we may know when the term is used throughout this trial what you mean by that term.

A. The Aztec Land and Cattle Company is a company that bought timber or bought land which had been given to the railroads back when the railroads first came into the western country. And the

(Testimony of Mrs. George H. Nagel.)

Aztec Land and Cattle Company had purchased the sections of land that had been awarded or given—it is kind of like a subsidy now. The Government gave the railroads that to get the railroads to go through.

Q. Without going into that much detail—

A. The blocks of Aztec timber were every other section on the even—or was it the odd number—I don't know, ten miles, what it was, but anyway a strip across—I don't know, ten miles, what it was, but anyway a strip across the Forest, every other section was awarded to the Aztec Land and Cattle Company. When this land was awarded to them it took it out of our forest and the sustained yield was naturally lowered that was allowed to the mills.

Q. Is it correct to say this, that there were two sources of timber available for the two mills at Winslow, [41] one, Forest Service timber, and two, Aztec timber? A. Yes, sir.

Q. Is it correct to say the Aztec timber was privately owned timber? A. Yes, sir.

Q. And the Forest Service timber was of course Government timber? A. Yes.

Q. So when you refer to Aztec timber you mean privately owned timber as distinguished from Forest Service, is that right? A. Yes, sir.

Q. Now, did Mr. Liberman at that time, September, 1958, own any Aztec timber rights himself?

A. Yes, sir, he owned his original purchase less the fourteen million which was represented to us to have been owed by him to the Gallagher interests.

(Testimony of Mrs. George H. Nagel.)

Q. Did the Nagel Lumber & Timber Company also own Aztec timber at that time?

A. Yes, sir.

Q. Was there any timber under contract to the Gallagher mill by the Forest Service at that time? A. Yes, sir.

Q. And similarly under contract to the Nagel Lumber & Timber Company? [42]

A. Yes, sir.

Q. Mrs. Nagel, do you know if Mr. Liberman at that time was milling in any way or coverting from timber to lumber any of his Aztec timber?

A. Yes, sir.

Q. Do you know how that was being done?

A. It was being manufactured in the Gallagher mill.

Q. Under an agreement between Liberman and Gallagher? A. Yes, sir.

Q. Was there any discussion in this September 20 conference with regard to the milling of the Liberman Aztec timber? A. Yes, sir.

Q. Tell us what was said in that regard, please?

A. We said something to the effect that—well, before Mr. Liberman had asked us to cut his Aztec timber.

Q. You mean before September 20th?

A. Yes. And I said something to the effect that \$2 was too cheap and, "you wouldn't manufacture it for \$2." And he said, "no," I said, "you are paying

(Testimony of Mrs. George H. Nagel.)

\$3 now, aren't you?" and he said, "yes." He said, "why change that \$3," when we were discussing the cutting contract that he had.

Q. This was September 20th? A. Yes, sir.

Q. He said, "why change that?" [43]

A. Yes.

Q. At that time you were discussing his mill agreement? A. Yes.

Q. Did you know at that time the other terms?

A. Yes. Tom had given me the terms. I knew them, but Tom had given them to me over the phone when he called and offered us the deal.

Q. What were those terms?

Mr. Moore: If the Court please, that contract is one of the documents that was marked.

Mr. Romley: I think that is correct.

Mr. Moore: It is the best evidence, speaks for itself.

Q. (By Mr. Romley): That speaks for itself. In substance you and Mr. Liberman and Mr. Jenkins discussed his milling agreement he had with Gallagher?

A. Yes. We did not discuss it extensively but we did discuss it.

Q. Mr. Liberman said to you with regard to that milling agreement as you related, "why change that?" A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. When the conference broke up that day on September 20th did you feel or did the parties say anything to indicate they had reached an understanding or agreement as to what they were going to do with regard to this contemplated [44] purchase? A. Of the mill, sir?

Q. The mill and timber, yes.

A. My understanding was——

Mr. Moore: Just a moment——

Q. (By Mr. Romley): Not your understanding, what the parties said. Did they make arrangements to go forward or drop the matter?

A. Yes, that Mr. Liberman would return home, return to Albuquerque and the contract would be written up as we agreed and Bob would come over and look at the agreement and sign it and exercise our right of first refusal with Mr. Gallagher.

Q. You say exercise your right of first refusal?

A. Yes, sir.

Q. What do you mean by that?

A. I mean to tell him yes or no, we would or would not take the mill, would not buy it.

Q. Did you have any discussion with Mr. Liberman on September 20th as to what Bob would say to Gallagher? A. Yes, sir.

Q. What was said in that regard?

A. We agreed that Bob would tell him——

Mr. Moore: I object, if your Honor please, the question calls for conversation, not the conclusion as to [45] what was agreed.

(Testimony of Mrs. George H. Nagel.)

The Court: Tell us what was said, Mrs. Nagel.

A. Mr. Liberman didn't want us to tell Tom that he had been over there.

Q. (By Mr. Romley): When you say Mr. Liberman didn't want you to, did he tell you he did not want you to tell Tom?

A. He didn't want Tom to know, yes, he had been there, it might keep him from making his deal, from buying the mill.

Q. Did Mr. Liberman make any suggestion as to what Bob should say to Tom?

A. I am sure he did, sir, but I can't remember his exact words.

Q. I am not asking for that. Could you tell us the substance of anything he did say with regard to Bob's talk with Tom?

A. I am afraid I can't, exact words.

The Court: Mr. Romley, at this time we will take the morning recess for about five minutes.

(recess) [46]

After Recess:

Q. (By Mr. Romley): Mrs Nagel, you have referred in your testimony to the conference in your office on September 20th. You have also told us of the first refusal agreement that you had with Gallagher. Do you remember if there was any discussion, and if so what was said in that September 20th conference with regard to the first refusal?

(Testimony of Mrs. George H. Nagel.)

A. Mr. Liberman asked me to call Tom and tell him that we were exercising our right of first refusal, that we were not giving to buy the mill. And I told him that I thought Tom deserved the courtesy of us coming to him and I told him that I would send Bob to see Tom Gallagher and tell him that we were not going to buy the mill. We had agreed that we would withdraw from the deal, that we would not buy the mill and agreed that Mr. Liberman would buy the mill.

Mr. Moore: We object to the conclusions, if your Honor please, not limited to conversation.

The Court: May I have the last part of the answer?

(Whereupon, a portion of the last answer was read as follows: "We had agreed that we would withdraw from the deal, that we would not buy the mill and agreed that Mr. Liberman would buy the mill.")

The Court: That last part will be disregarded, the characterization of "agreed."

Q. (By Mr. Romley): Will you tell us, Mrs. Nagel, what, [47] if anything, was said in the conference of September 20th with regard to the Nagel Company buying the mill and with regard to what should be done?

In other words, you have stated a moment ago and the Court disregarded, properly I think, "We agreed thus and so."

(Testimony of Mrs. George H. Nagel.)

Now, you tell us what was said and the Court will determine if there was a agreement.

A. Mr. Liberman said, "I will buy the mill and I will give you an option agreement to buy one-half interest in the mill and the timber." In the deal is what we call it.

Q. In the what?

A. The deal, the mill and the timber.

Q. The mill and the timber. And what did he say with reference to when you might buy this one-half interest in the mill and timber?

A. That we would have until April the 20th.

Q. Did he say anything with reference to what you should do or your company should do with regard to the first refusal agreement or understanding you had with Gallagher?

A. He asked me to call Tom and tell him that we were exercising our right of first refusal and I told him that I thought Tom deserved more courtesy, that I would send Bob to see him and tell him.

Q. And what did Mr. Liberman say to that, though?

A. Said to be sure and not tell Tom that he had been over [48] there.

Q. That he had been over to see you, you mean?

A. Yes.

Q. Did he say anything to indicate that he disagreed with your proposal of sending Bob?

A. No, not that I remember.

Q. In substance that was the discussion then, is that right? A. Yes.

(Testimony of Mrs. George H. Nagel.)

Q. Now, did Bob go to Albuquerque as you have indicated? A. Yes.

Q. It was agreed he would go?

A. He went the day after they agreed that he would go, he either couldn't see Tom—I don't believe he could see Tom Gallagher that day, that was on Monday. So it was arranged over the telephone that Bob would go Tuesday.

Q. And Bob went alone, did he?

A. Yes. Well, he went with Dale Nelson.

Q. All you know with regard to what transpired there has come to you from the words of Bob or Dale or someone else then, because you weren't present?

A. Except the agreement that I saw.

Q. I see. Now, did you at any time say to Mr. Liberman or any of the defendants, and it might be well just at this point to clear up one point. Were all your dealings with Mr. [49] Liberman on behalf of the defendants? Did you ever talk to Joe Grevey or Jack Grevey and his brothers?

A. No, sir; no, sir.

Q. Your dealings were entirely with him?

A. Yes, sir.

Q. Liberman. Did you ever say to Mr. Liberman that you did not want to go through with the option or the agreement that you made with him on September 20th and that is referred to in the letter agreement of September 23rd? A. No, sir.

(Testimony of Mrs. George H. Nagel.)

Q. Did it continue in existence from the time it was made?

Mr. Moore: We object to that as calling for a legal conclusion, if your Honor please.

The Court: That would be a conclusion. She may tell what was said and what was done.

Q. (By Mr. Romley): The evidence here, and I don't recall the exhibit number, but the evidence here shows that a written agreement was entered into by Gallagher or his group and Liberman and his group for the sale by the former to the latter of the plant and timber. You have seen a copy of that agreement, have you not? A. Yes.

Q. And you know that Liberman and his group did purchase the plant? [50] A. Yes, sir.

Q. The plant and timber? A. Yes, sir.

Q. Did you at any time prior to April 30th, 1959, have any further conversation with Mr. Liberman with regard to the option granted you by that agreement of September 20th and 23rd?

A. Yes, sir.

Q. Did you have any such conversation with him after the purchase of the Gallagher properties?

A. Yes, sir.

Q. Do you recall approximately when that discussion took place?

A. When I was present it was in January, sir.

Q. Of 1959? A. Yes, sir.

Q. Do you know whether anyone on your behalf or on your company's behalf or your firm's behalf talked with Mr. Liberman prior to that date?

(Testimony of Mrs. George H. Nagel.)

A. Yes, sir.

Q. Do you know who that was?

A. Bob Jenkins and also Mr. Cox.

Q. Jim Cox? A. Our attorney.

Q. Yes, Jim has been your attorney for how long? [51]

A. I can't be sure, sir, but it's been a long time.

Q. Several years?

A. Yes, ten or fifteen, I'd say. Fifteen; ten to fifteen.

Q. Mrs. Nagel, when did you first learn the terms of the sale by Gallagher to Duke City?

A. It was January, I believe it was January the 6th but anyway—yes, of '59 when we saw the contract that Mr. Liberman had—the purchase contract of the properties.

Q. Where did you see that?

A. In Judge Johnson's office in Albuquerque.

Q. Had any request been made for you or Bob Jenkins to see that prior to that time?

A. Yes, sir.

Q. Had there been any compliance with that request? A. No, sir.

Q. And until you saw the contract on January 6th, 1959, in Judge Johnson's office are you telling me you did not know what the terms were?

A. That's right, sir.

Q. Now, for the record I assume we should identify Mr. Johnson. He is Judge Johnson, he is attorney the Albuquerque attorney for Mr. Liberman, is that right? A. That's right.

(Testimony of Mrs. George H. Nagel.)

Q. Did you ever at any time have any conversation with Mr. Liberman with regard to whether you would or would not [52] exercise your option to purchase a half interest in the mill and timber as provided for by your September agreement?

A. Yes, sir.

Q. When did that conversation take place?

A. October 16th, I believe.

Q. Tell us what occurred in that regard?

A. The telephone rang, I thought—as I remember it was real early, I thought it was 3 o'clock. As I remember it was 3 o'clock in the morning. And he asked me to wire him——

Q. Now, this was a long distance telephone call?

A. Yes. Mr. Liberman asked me to wire him a release from the option agreement.

Q. Did he tell you where he was?

A. He gave me the address the Essex House in New York, to send the telegram.

Q. And what did he say with regard to any negotiations for the purchase?

A. I think he said he was there to buy the mill but I wouldn't be sure. Maybe I concluded that. But I believe he said he was there to buy the mill.

Q. And he asked you specifically——

A. And he needed this option to proceed.

Q. You say he needed this option to proceed?

A. I mean this release from the option.

Q. All right. And what did you say? [53]

A. I didn't think that we would want to give him a release, but I would talk with Bob.

(Testimony of Mrs. George H. Nagel.)

Q. This is what you told him? A. Yes.

Q. And did you talk to Bob? A. Yes, sir.

Q. How long after this telephone call, the same day?

A. Well, the same day, yes, sir. In the morning early, as soon as I could get in touch with Bob.

Q. Where was Bob at that time?

A. He was in Phoenix.

Q. Did you talk to him by long distance that morning? A. Yes, sir.

Q. Do you know where he was in Phoenix?

A. I didn't get him at the hotel, I got him in Mr. Cox's office about 8—well, it was before 8 o'clock, I think.

Q. In the morning? A. Yes, sir.

Q. And did you tell him of your conversation with Mr. Liberman?

A. I told him that Mr. Liberman wanted us to release the option.

Q. And following that conversation you had with Bob Jenkins, did you do anything with reference to contacting or [54] conveying any message to Mr. Liberman?

A. Yes, sir, I sent the telegram.

Q. You sent him a telegram? A. Yes, sir.

Q. Which has been received in evidence here, is that right? A. What is it?

Q. The telegram that has been received in evidence? A. Yes, sir; yes, sir.

(Testimony of Mrs. George H. Nagel.)

Mr. Romley: We have only a photocopy of it which has been marked as Plaintiffs' Exhibit 2. This is in evidence, is it?

The Clerk: Yes.

Q. (By Mr. Romley): Plaintiffs' Exhibit 2 appears to be a photo. But can you look at that and tell us if that is the telegram you sent him?

A. Yes, sir, that's the telegram.

Mr. Romley: May we stipulate, Mr. Moore, because of the partial illegibility of this telegram, that it is dated October 16th, 1958, and appears to have been sent about 8:24 as I read it, is that correct? Do you have the original?

Mr. Moore: We have a better copy than that, I think we have the original somewhere in our files. Yes, the date is correct and the time is approximately correct, 8:24 or 8:28 a.m., stamped on it. This is just the same kind of a copy. [55] October 16th, this is stamped 8:29.

Mr. Romley: Perhaps we could stipulate for the record, if your Honor pleases, from a more legible copy that counsel has that it appears that the telegram which is Exhibit 2 in evidence was sent from Winslow, Arizona, at 8:29 a.m. and was received in New York City at 11:38 a.m.

Mr. Moore: That is received at the Western Union station and not delivered to the defendant at that time?

Mr. Romley: That is correct, because that is impossible to read on this exhibit, your Honor.

(Testimony of Mrs. George H. Nagel.)

Mr. Moore: That stipulation is correct.

The Court: Very well, the record may show the stipulation.

Q. (By Mr. Romley): Now, did you have any further conversation with Mr. Liberman on that day? A. Yes, sir.

Q. Do you recall how many conversations after the first one early in the morning when you say he called you?

A. I can't be sure whether one time or two.

Q. How many do you recollect?

A. I remember the call when he told me the mill—he had bought the mill for \$650,000, but he had only paid \$17 for the timber. [56]

Q. Was that in the first conversation or a later conversation?

A. That was the last conversation.

Q. The last conversation? A. Yes, sir.

Q. Where were you when you talked to him at that time?

A. I was in my office at the mill.

Q. Was that conversation initiated by you or by his calling you? A. By his calling me.

Q. Can you tell us whether it was morning or afternoon? A. It was afternoon.

Q. It was afternoon; I don't suppose you recall the hour?

A. It sticks in my mind it was late. I am not sure though.

(Testimony of Mrs. George H. Nagel.)

Q. In any event in the afternoon?

A. Yes.

Q. Can you tell us the substance of that conversation?

A. He said he had bought the mill and I said I was glad he had, and he had paid \$650,000—he had to pay \$650,000 for it, but that he paid \$17 for the timber. And I don't remember about the other part of the conversation just for sure.

Q. Did you during that conversation, or did he during [57] that conversation say anything to you about having received a telegram?

A. Oh, there must have been a call between that, because I know he asked me to come to New York. He asked me something about the releasing the option and I said, "didn't you get my telegram." and he said yes he did, he got the telegram.

Q. Did he ask you at that time to release the option?

A. I think he said that was not important, or something to that effect and he wanted me to come to New York and I told him I couldn't.

Q. Did you at that time or at any time say to him you would release him from the option?

A. No, sir.

Q. Did you later, after October, 1958, have any conversation with Mr. Liberman with regard to your exercise of the option granted by the September, 1958, agreement?

(Testimony of Mrs. George H. Nagel.)

A. When we went to Albuquerque.

Q. You mean in January? A. Yes.

Q. Of 1959? A. Yes.

Q. Who was present at that time?

A. Mr. Cox and Bob Jenkins.

Q. And who else?

A. Mr. Liberman and Mr. Johnson and I were present. [58]

Q. Just the five of you? A. Yes.

Q. Where was this meeting?

A. In Mr. Johnson's office.

Q. Can you tell us what was said in that conference?

A. Someone told Mr. Liberman we had come to see the option or we had come to see the contract, the purchase contract and his attorney advised him to let us see it and we were excused to go into the library to read it. And Mr. Cox and Bob and I went into the library and looked at the contract and went back into the office and I told Mr. Liberman we were ready to exercise our option. I told him he had made a real good deal, we were ready to exercise our option and take the half interest and he said he had no obligation to us, that it was a different deal.

Q. Do you remember anything more that was said at that time?

A. I don't know if I said that it was a good deal. I said, "yes, I know," I said, "you have really made a good deal," and I would have to hand it to him for that, something to that effect.

(Testimony of Mrs. George H. Nagel.)

Q. Did you have any further conference which you personally attended with Mr. Liberman after that date, after January 6th, approximately, 1959 and prior to the commencement of this action? [59]

A. I don't believe so. I left it in the hands of our attorney from that time because he refused to let us exercise our option as the contract stipulated.

Q. That is Mr. Liberman did?

A. Yes, and as he had agreed.

Q. You have told us in effect that in January, January 6th, 1959, you wanted to exercise your option?

A. Yes, sir.

Q. You told Mr. Liberman that?

A. Yes, sir.

Q. Were you able to do so financially at that time?

A. Yes, sir.

Q. And he refused to allow you to?

A. Yes, sir. Our option was to purchase at the terms and conditions under which he purchased the mill. He had paid a very small sum down. Of course he had to have operating capital.

Q. Were you prepared to do everything required of you under that contract?

A. Yes, sir.

Q. Or agreement on September, 1958?

A. Yes, sir.

Q. And told him so? A. Yes, sir.

Q. Have you continued to manage and operate the Nagel [60] mill since that time?

(Testimony of Mrs. George H. Nagel.)

A. Yes, sir.

Q. Bob has been your assistant?

A. Yes, sir.

Q. And has the Gallagher mill been operated since that time by Duke City? A. Yes, sir.

Q. Can you tell us, Mrs. Nagel, if anyone ever has bid against you in connection with the Forest Service contracts that have been entered into by the Nagel mills since 1942?

Mr. Moore: We object to that as immaterial, if your Honor, please, whether they have or not is no proof it would not be done or could not be done. It is not material or relevant at this stage of this lawsuit.

The Court: I don't see the materiality of it, Mr. Romley.

Q. (By Mr. Romley): Mrs. Nagel, do your records reflect the amount of timber that has been purchased by the Nagel mill and manufactured?

A. Yes, sir. We have had a continuous supply of timber from the time we started through our bidding and purchase from the Forest Service.

Q. I don't recall whether the Aztec contracts are in evidence. Did you have some agreement or agreements with regard to the purchase of Aztec timber? [61] A. Yes, sir.

Q. Is that the only privately owned timber the Nagel mill had ever acquired between 1942 and September, 1958?

A. Yes, sir, that is all we have access to.

(Testimony of Mrs. George H. Nagel.)

Q. Do you remember when those agreements were made? A. Yes, sir.

Q. Tell us, please, approximately.

A. They were signed May 23rd, 1956, I believe.

Q. And has all of the timber provided for under that agreement been cut? A. No, sir.

Q. Are you still in the process of cutting?

A. Yes, sir.

Mr. Romley: You may cross-examine.

Cross Examination

Q. (By Mr. Moore): Mrs. Nagel, there is one term I want to clarify before we get into other matters. You used the term twice of "sustained yield," by stating that the sustained yield was lowered by taking the Aztec timber out of the Forest Service. Actually there is not a sustained yield agreement with reference to the operation of either sawmill in Winslow, is there?

A. It is an area that has been designated. [62]

Q. No, is there a sustained yield agreement in existence?

A. Not a sustained yield agreement. It is a term we use in referring to the yield that has been set up for the area.

Q. Well, the Forest Service does have sustained yield arrangements at one place in Arizona, that is at Flagstaff, isn't that true? A. Yes, sir.

Q. That is the only place in Arizona where there is a sustained yield agreement?

A. Well, yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. With reference, Mrs. Nagel, to your negotiations with Mr. Gallagher, you first talked to him about 1956 when you were discussing the possibility of a merger between the Winslow Timber Company plant and your plant, isn't that right?

A. No, sir. At that time we were discussing an outright purchase. One or the other of us would buy the mill.

Q. But there was no agreement in writing between you? A. No.

Q. Later then you discussed a possible merger of the two plants? A. Yes, sir.

Q. Nothing in writing about that?

A. We discussed merger more than one time.

Q. The next time you discussed a purchase was sometime [63] in 1958 after this original discussion in 1956, wasn't it? A. Yes.

Q. The arrangement you described was simply an oral statement that one or the other made, if you sell to be sure to give me the first chance at it?

A. We had an agreement that if either one of us decided to sell we would offer it to the other first and we called that the right of first refusal.

Q. That was all oral? A. Yes, sir.

Q. There was nothing in writing about it?

A. Yes, sir.

Q. You had no written correspondence or documents of any kind that show the terms of such a first refusal agreement, do you? A. No, sir.

(Testimony of Mrs. George H. Nagel.)

Q. Now, in 1958 can you tell me the approximate date when Mr. Gallagher talked to you or called you and said he was offering his mill for sale?

A. No, sir, I can tell you approximately, but I can't tell you exact.

Q. What is the approximate date?

A. I think it was sometime during August, the first part probably.

Q. First part of August? [64]

A. Maybe middle of August. I don't know what the date was, sir.

Q. That information came to you by way of a telephone call from Tom Gallagher?

A. Yes, sir.

Q. To you by long distance? A. Yes, sir.

Q. And in that telephone call he priced the mill to you at \$500,000 cash, is that right?

A. Yes, sir.

Q. And he separately priced timber cutting rights to you at 19.45 for the Aztec timber he had?

A. He said—the exact words as I remember were that the Liberman contract would almost pay the mill out and he gave me the terms, which were \$3 a thousand for profit and \$4.33 for depreciation and \$75,000 a year for overhead. He just said general overhead.

Q. Did he tell you he had the right to assign that contract?

A. Yes, sir, he did, I asked him.

(Testimony of Mrs. George H. Nagel.)

Q. You later learned from Mr. Liberman at the September 20th conference Mr. Liberman contended Mr. Gallagher could not sell that contract, didn't you?

A. I learned he contended, but I can't say what I think, can I? [65]

Q. No. You may be a better lawyer than we are. But you later learned there was some debate about the right of Mr. Gallagher to assign that contract?

Mr. Romley: We object to that question. Debate by whom or contention by whom? The question is not complete, your Honor.

The Court: I think the question was there was some debate——

Mr. Moore: Contention by the various parties with respect to it, Mr. Gallagher and Mr. Liberman.

Mr. Romley: Now, I think the question should be more specific. You mean by Gallagher or by Liberman? It is a duplicitous question.

The Court: I think you should designate what contention to the witness.

Q. (By Mr. Moore): Let me clarify it, Mrs. Nagel. You learned in your discussion with Mr. Gallagher that he contended at that time he could sell or assign the contract he had with Mr. Liberman's group when he called you about the mill?

A. Yes, sir.

Q. You later learned from Mr. Liberman that he contended Mr. Gallagher did not have the right to sell or assign that contract, is that not right?

(Testimony of Mrs. George H. Nagel.)

A. I can't remember for sure Mr. Liberman told us for sure when he came over there he didn't have a right to sell it. [66]

Q. You learned that in some discussion with Mr. Liberman, didn't you?

A. He was coming over to tell us——

Q. That is not what I asked you. You did later learn from Mr. Liberman that he contended that Mr. Gallagher did not have the right to assign that milling contract, is that not true?

A. Yes, sir.

Q. Was the \$500,000 price of the mill too high in August, 1958, when Mr. Gallagher offered it to you? A. No, sir.

Q. You did not have the funds at that time to make the purchase?

A. I didn't have \$500,000 in cash.

Q. You talked to Mr. Ben McKinney of the Valley National Bank about it? A. Yes, sir.

Q. You had no commitment or agreement from Mr. McKinney that the bank would loan you the money?

A. We had the commitment to the effect that they would consider it.

Q. Written? A. No, sir.

Q. Commitment? A. No, sir. [67]

Q. All that amounted to was conversation between you and Mr. McKinney about a prospective loan from the bank to finance that purchase for you, is that not true?

(Testimony of Mrs. George H. Nagel.)

A. That is true, but the conversation with Mr. McKinney, I have never had them written.

Q. You had a written loan agreement with the Valley National Bank at that time?

A. That is right, but that was after we had come to the conclusion.

Q. That is what I say, but you did have the written loan agreement in existence prior to the time you were talking about this loan?

A. Yes, sir.

Q. As a matter of fact, under the prior loan agreement you could not enter into any different business or enlarge without the approval of the bank, isn't that right?

A. Would you ask again, please?

Q. As a matter of fact, in August, 1958, you had a written contract with the Valley National Bank which prohibited you from enlarging or expanding your business or engaging in any new business without the prior permission of the bank, is that not right?

A. Yes, sir.

Q. In addition to the monthly payments which you agreed to make of fifty per cent of your income after certain [68] deductions were to be paid to the bank under that written agreement, is that not true?

A. That is true, but they have given us permission to defer that or it has never been exercised.

(Testimony of Mrs. George H. Nagel.)

Q. But that was in the written agreement of August, 1958?

A. That was in the agreement, yes, sir.

Q. I say you did not at any time prior to September 23rd have a commitment from the Valley Bank they would loan you the money to buy the Gallagher mill in Winslow, is that true?

A. They have not told us they would not loan it.

Q. My question is this, you did not have a commitment they would make the loan, did you?

A. No, sir. Had a commitment they would take it under consideration.

Q. Have you actually made application to the bank for a loan of a given sum of money?

A. No, sir.

Q. Had you actually given to the bank a prospectus of what this business might do?

A. No, sir.

Q. Had you actually submitted to the bank the terms and conditions of the purchase of that business?

A. Yes, sir, orally. [69]

Q. And that included the purchase price?

A. Yes, sir.

Q. Did you give to the bank any statement with reference to the necessary operating capital it would take to operate it?

A. I think I did.

Q. Was that oral? A. Yes, sir.

Q. All of your negotiations with Mr. McKinney were oral about that matter? A. Yes, sir.

Q. And he simply told you in effect they would study it after they got the figures from you they

(Testimony of Mrs. George H. Nagel.)

could look over and let you know, in substance that is what he told you?

A. Mr. McKinney told me to go back and make my projections as I did when we were negotiating the loan for the purchase of the Aztec timber. He calls it a preformer. There is a term the bank uses, preformer something, it takes into consideration the back history and the projections, the back history of the company and projections.

Q. He asked you then to prepare such a document showing the back history and projections?

A. Just like we did for the Aztec loan.

Q. Did you prepare such a computation?

A. I hadn't yet. [70]

Q. I did not understand.

A. I had not prepared them yet.

Q. Yet—

A. When Mr. Liberman came over.

Q. Mr. Gallagher told you originally he wanted to know in thirty days, didn't he?

A. Yes, sir.

Q. That was sometime you think about the middle of August, in that area?

A. It might have been a little after the middle. I can't remember, sir, what it really was.

Q. When Mr. Gallagher offered the mill at \$500,000 did in that conversation he tell you he had pooled or swapped timber with Mr. Liberman?

A. No, sir, he told me that he had fourteen million feet of timber owed to him by Mr. Liberman.

(Testimony of Mrs. George H. Nagel.)

Q. He didn't say anything to you about swapping or trading or they had traded timber for timber?

A. He didn't say anything about it, but I would suppose that——

Q. No, I am just asking what he said.

A. No. He said he owed him, that is what he said, Mr. Liberman owed him fourteen million feet. That was in giving me the amounts of timber.

Q. Had Mr. Gallagher written you a letter on April 30th, [71] 1958, in which he told you when you were talking about the merger that he had pooled or traded timber with Mr. Liberman and any deal he worked out with you would have to be submitted to Mr. Liberman?

Mr. Romley: I object to the form of the question as not the best evidence.

Mr. Moore: I will find out if she has the best evidence. It is preliminary.

The Court: She may answer.

The Witness: What was the question?

Mr. Moore: Will you read the question?

(The last question was read)

Q. (By Mr. Moore): Or words to that effect?

A. April 30, 1958? I don't remember the letter, sir.

Q. Do you ever remember seeing a letter dated on about that date that contained in substance what I have outlined to you?

A. No, I don't remember it.

(Testimony of Mrs. George H. Nagel.)

Q. When was it you had the telephone conversation with Mr. Liberman with respect to your meeting in Winslow on September 20th?

A. I don't know the exact date.

Q. Do you recall it was on the 18th of September Mr. Liberman called you and asked you if you had purchased the Arizona Timber Company Mill in Winslow? [72]

A. I don't know what date it was he called me.

Q. Did he make that statement to you in that call?

A. He asked me if I had purchased it? I hadn't.

Q. No, did he ask you that?

A. I don't remember.

Q. You don't remember such a conversation with him in the call preceding this September 20 meeting?

A. No, sir, I don't.

Q. Do you remember saying to him in that conversation that you had not bought it and in substance you were not able to buy it and you wanted to come over and talk to Mr. Liberman about it?

A. I didn't say that.

Q. You did not say that or anything in substance like that?

A. No, sir.

Q. In response to that statement or something similar to that did Mr. Liberman say, "Mrs. Nagel. I will be happy to come over to Winslow and talk to you."?

A. No, sir.

Q. What was the conversation when you say Mr. Liberman called you and made the appointment to meet on September 20th?

(Testimony of Mrs. George H. Nagel.)

A. I am not sure Mr. Liberman talked to me. He may have talked to Bob but he may have talked to me. He didn't tell me why he was coming over or at least I didn't know. [73]

Q. What was the conversation that you recall, if any? A. I don't recall the conversation.

Q. Do you recall anything about how the arrangements were made whereby you met on September 20th in your office?

A. As I remember it, Mr. Liberman called me and asked if he could see me in the morning, on Saturday morning, and I said he could and we met and that is what I remember about it. I don't remember where I was when I talked to him or anything at all about it.

Q. That is all the conversation you recall or can recall at this time?

A. Well, I don't even recall that for sure. [74]

Q. (By Mr. Moore): What time did he arrive at your office on the morning of September 20th?

A. I would say it was approximately 10 o'clock, but I don't remember the exact time.

Q. Now, how did you get into the subject of purchasing this Arizona Timber Company mill?

A. You mean for Mr. Liberman purchasing?

Q. You were talking about purchasing it too, weren't you?

Mr. Romley: Are we speaking of September 20th?

(Testimony of Mrs. George H. Nagel.)

Mr. Moore: Yes.

A. I think that Mr. Liberman said, "Let's buy the mill together."

Q. Did you tell Mr. Liberman that you were negotiating to buy it? A. Oh, he knew I was.

Q. How did he know that?

A. I'm sure we discussed that—something to the effect that we were—I think Mr. Liberman asked me how much Tom wanted for the mill and I said, "\$500,000 cash." And he said that it was the same price—let's see. I think he said—no, \$500,000 cash, that's what I told him. And I don't know what else we said about it, but I remember telling him that Tom wanted \$500,000 cash for the mill and he said that he could buy it cheaper. He said he could buy it \$100,000 cheaper. [75]

Q. You started to say that, "He said that's the same—" and there you stopped. Now, what was it Mr. Liberman said with respect to "that's the same"?

A. He said he could buy it \$500,000 cheaper—I mean \$100,000 cheaper than we could, I remember that.

Q. Did he say, "Well, that's the same price he offered it to me"?

A. I don't recall that, sir. I don't believe he did, because when he said he could buy it \$100,000 cheaper I would have wondered, I didn't question that he could buy it \$100,000 cheaper.

Q. Did you tell him that you were not going to buy the mill? A. No.

(Testimony of Mrs. George H. Nagel.)

Q. Did you tell him that you were not in a position at that time to take on the financial burden to buy the mill? A. No, I did not.

Q. Did you tell him that your 30 days was just about up or was up, that you—within which you were to let Mr. Gallagher know if you would accept his proposition?

A. I don't remember whether I told him that or not.

Q. This is not in line with what I was asking you, Mrs. Nagel, but I wanted to ask you this before the noon recess: Do you have your correspondence file—first, do you keep a file of correspondence that you had with Mr. Gallagher during [76] 1958?

A. Yes. We didn't have much correspondence, I guess. If I had any, I kept it.

Q. Did you keep copies of letters that you wrote to Mr. Gallagher in 1958? A. I would say so.

Q. And you kept the original letter you received from Mr. Gallagher in 1958?

A. I would say so.

Q. Do you have that file in Tucson?

A. I believe I do.

Q. Then could I ask you to look through it and this afternoon produce the original letter from Mr. Gallagher to you under date of April 30th, dated April 30th or close to that, 1959, which referred to pooling or trading of timber with Mr. Liberman and that any dealing made with you would have to be submitted for some purpose to Mr. Liberman or should be?

(Testimony of Mrs. George H. Nagel.)

A. April 30th? Yes, sir, I will look.

Q. A letter from Mr. Gallagher to you on May 12th, 1958, about a merger and that any added cost in connection with the operation of the mill at Winslow must be approved by Mr. Liberman and referring to the satisfactory dealings that he had had with Mr. Liberman up until that time? Do you recall such a letter? [77]

A. No. I will look though. I'm sure that he—since—I don't know, I will look and see, though, if I have those.

Mr. Moore: There are some others that later I will get into the substantive matter of and lead up to them and see if you have them, Mr. Romley.

Mr. Romley: If you can give me the dates I will try to get them all during the noon recess.

Mr. Moore: Well, I think that will cover what I want this afternoon.

Mr. Romley: You want just these two then?

Mr. Moore: Yes. Your Honor, I am at a stopping point if it's convenient for the Court.

The Court: Very well, we will recess at this time until 1:30.

(Whereupon, a recess was taken from approximately 12:00 noon until approximately 1:30 o'clock p.m.) [78]

Afternoon Session, May 3, 1960, 1:30 o'clock p.m.

Mr. Romley: If the Court pleases, for the record I advised counsel that we searched the files

(Testimony of Mrs. George H. Nagel.)

during the noon recess with regard to requests that we produce two letters dated on or about April 30th and May 12th, 1958, with regard to the subject there indicated by counsel and we do not have such letters. There may be some letters in Winslow, we haven't checked there. If counsel desires, we will put in a call tonight and find out.

Mr. Moore: I will be happy to pay for the call if you will do that.

Mr. Romley: All right, sir.

Mr. Moore: And in connection with that, Mr. Romley, if I may address Mr. Romley, your Honor, directly, if there is such a file in Winslow we would like for you to have it sent down containing all correspondence in 1958 between Mr. Gallagher and Mrs. Nagel, one to the other.

Mr. Romley: We will be happy to comply.

Q. (By Mr. Moore): Mrs. Nagel, we discussed this morning very briefly the loan agreement which you had with the Valley National Bank where certain requirements that we mentioned are discussed. Is that a copy of that agreement?

A. Yes, sir.

Mr. Moore: I handed the witness Defendants' Exhibit B [79] which we now offer in evidence.

Mr. Romley: No objection. That's the copy of the one we furnished you?

Mr. Moore: That is the copy that you furnished, Mr. Romley. I promised Mr. Robbins I would make a photostat for him and I didn't anticipate using

(Testimony of Mrs. George H. Nagel.)

this. I did make one photostat, I think we have an extra which we will furnish to you.

The Court: It may be received as B in evidence.

(Defendants' Exhibit B received in evidence.)

Q. (By Mr. Moore): Now, Mrs. Nagel, you said this morning, as I recall, that after your telephone conversation with Mr. Gallagher when he offered to sell you the Winslow mill for \$500,000, and he put a price on timber that you had Mr. Nelson, who is your comptroller, I believe, prepare certain computations and projections? A. Yes, sir.

Q. And among those, did he prepare a sheet entitled, "Cash Flow Statement, 10/1/58 to 12/31/58, A. T.—" something, "A. T. Cole," or do you recall?

A. I think he did, may I see it?

Q. Let me hand you what the clerk has marked as Defendants' Exhibit A for identification and ask you, Mrs. Nagel, if that is a copy of one of the sheets prepared by Mr. Nelson at your request after your conversation with Mr. Gallagher? [80]

A. Yes, sir, but not for the bank.

Mr. Moore: We now offer in evidence Defendants' Exhibit A. This is one that you produced too.

The Witness: There were other parts to that also.

Mr. Moore: Yes.

Mr. Romley: The only objection we make, if your Honor pleases, is that this is not complete,

(Testimony of Mrs. George H. Nagel.)

according to the testimony there are other parts. I think that the whole should be marked or received.

Mr. Moore: You have copies of the others, this is the only one I want to offer at this time.

Mr. Romley: Well, I object, if your Honor pleases, unless the whole instrument is produced.

The Court: May I see it? Do you have the rest of it, Mr. Moore?

Mr. Moore: Yes, I have the rest of it. The only part I am interested in, in this, if the Court please, is the notation on loan requirements, and I thought I'd better use this than to ask the question as to what they anticipated as total loan requirements.

The Court: Well, I will receive it with the understanding that the rest of it may be put in by counsel for the plaintiffs if he desires. It will be A in evidence.

(Defendants' Exhibit A received in evidence.)

Q. (By Mr. Moore): Mrs. Nagel, now, I would like you to [81] look at Defendants' Exhibit A in evidence which is the document that you just looked at. You will note down towards the bottom it says, "Total Loan Requirements, one million four hundred—" and what is that figure? A. 82.

Q. 1,482,000. Do I correctly understand that that is what is estimated at that time as to the loan which Nagel would have to obtain in order to consummate a purchase of the Gallagher properties?

(Testimony of Mrs. George H. Nagel.)

A. No, sir, I'm sure that isn't right. Nagel Lumber and Timber Company, we would—yes, we would be required to furnish 107,000, Nagel Lumber and Timber Company, and we would have warehouse, some of the lumber as we were manufacturing it.

Q. But the total loan requirement on warehouse receipts or from banks or in a mortgage on the property——

A. He should have had that total cash.

Q. Let me ask the question first, please.

The total loan which was then anticipated would be necessary, whether it was warehouse receipts, bank loans or mortgages, was \$1,482,000-plus, is that not correct?

A. That's what this statement says, but I don't remember it as being that much.

Q. This statement was prepared——

A. That is the total cash that we figured it would take, [82] total, but not total loan.

Q. This statement was prepared by your Mr. Nelson for the purpose of showing the cash flow of statement? A. Yes.

Q. To show what you would need in the way of loans or warehouse receipts or something to consummate that purchase, isn't that right?

A. That is what that was prepared for, the cash flow. But I think that takes into consideration both mills, the cash flow would naturally.

(Testimony of Mrs. George H. Nagel.)

Q. Yes, I think the figures are on here of your mill. But that means an additional loan you would have to get either by warehousing lumber under warehouse receipts or borrowing it from the bank or a mortgage on the property, the total additional obligations you would have to incur would be \$1,482,450? A. But—

Q. Is that right?

A. He shows how he would raise that too.

Q. And he shows mortgage, \$917,820?

A. That's right.

Q. And warehouse, I assume that means warehousing receipts?

A. Yes, the lumber. But the mortgage would be on both plants, sir.

Q. The warehouse was \$457,500, is that [83] right? A. Yes.

Q. And at that time you had this loan agreement which is in evidence with the Valley Bank under date of May 1st, 1956? A. Yes, sir.

Q. And your obligation was not paid off under that loan agreement?

A. Not all of it but most of it.

Q. Now, Mrs. Nagel, I don't recall just how far I got into the conversations of September 20th. I think you told me you were in conference two or three hours. And I think you said that you had told Mr. Liberman that Mr. Gallagher had made you an offer to sell the mill at \$500,000, is that correct?

A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. In that conversation did Mr. Liberman say to you: "That's the same price that he offered it to me"?

A. I remember that he said he could get it \$400,000—I mean he'd get it \$100,000 cheaper and that would be \$400,000. So I can't be sure about that, sir. He may have.

Q. Did you then know or did Mr. Liberman tell you that on September 12th he had signed a proposal prepared by Mr. Gallagher which provided for a sales price on the mill of \$500,000?

A. No, sir.

Q. You since learned that, though, haven't you?

A. Since this case has started, yes. [84]

Q. And that at that moment, Mr. Liberman had a check for \$10,000 in the hands of Mr. Gallagher as earnest money on deposit?

A. He did not tell us that.

Q. You have since learned that to be true?

A. Well, I have since learned that he says it's true.

Q. Now, how—what reason did Mr. Liberman give you that he could buy this mill for \$100,000 less than the offer that was made to you, if any?

A. I don't think he gave a reason, sir.

Q. Did he say anything about he could get the cash and could get it cheaper for cash?

A. If he didn't say it, I assumed it.

Q. Even though the offer to you was cash?

A. That's right.

(Testimony of Mrs. George H. Nagel.)

Q. What caused you to assume that Mr. Liberman's cash would speak louder than your cash would and reduce the price by \$100,000?

A. There were other factors involved.

Q. What other factors?

A. Mr. Kaplan probably a good friend of Mr. Liberman's and Mr. Gallagher, maybe—Mr. Liberman might be able to go around Mr. Gallagher, I don't know. He didn't say he was, but—

Q. Did you consider that possibility while you were [85] discussing the matter?

A. No, but he might have.

Q. Did you know at that time that Mr. Kaplan was a friend of Mr. Liberman? A. Sure.

Q. How long had you known that?

A. I don't know, sir.

Q. Do you know what percentage or did you know what percentage either in capital stock or otherwise the percentage of ownership that Mr. A. I. Kaplan and his family had in the Arizona Timber Company? A. No, I didn't.

Q. Did you know whether it was half or more than half? A. No, sir.

Q. And in that connection did you ever have any word from Mr. Kaplan that Mr. Gallagher was authorized to make an oral agreement with you that he would give you the first refusal on the purchase of that mill? A. From Mr. Kaplan, no.

Q. That all came from Mr. Gallagher, all your discussions about that?

(Testimony of Mrs. George H. Nagel.)

A. All of my dealings was with Mr. Gallagher regarding the Winslow timber mill and the operations.

Q. Now, in your discussion there with Mr. Liberman on September 20th, you had considerable discussion about the mill, [86] did you not? By "mill," I mean the saw mill and the equipment and just that? A. No, sir.

Q. And the buildings? A. No, sir. [87]

Q. You didn't have any discussion with him about it?

A. Not considerable that I remember.

Q. Did you have any discussion about buying timber?

A. The deal was timber and sawmill.

Q. Just answer my question. In the conversation did you and Mr. Liberman discuss the purchase of the timber rights of Arizona Timber Company?

A. Yes, sir.

Q. What was said about that?

A. I said that what we were interested in was the timber rights and he was interested in getting his Aztec cut and he proposed the option—I mean he proposed an agreement he would agree to sell to us after seven years, which would give us that timber right.

Q. Did you have any discussion about your and Mr. Liberman's buying the timber right from Gallagher?

(Testimony of Mrs. George H. Nagel.)

A. The timber right was in the deal.

Q. Did you discuss the purchase of timber?

A. We discussed the deal and that was part of the deal, the timber and the mill.

Q. My question is, Mrs. Nagel, segregating timber from the mill.

A. We did not discuss it that way because it did not belong that way, it went together.

Q. Did you discuss the purchase of timber? [88]

A. We discussed the purchase of the mill and timber.

Q. What discussion did you have with respect to the timber and timber alone?

A. We discussed cutting his Aztec and we discussed the amount of Forest Service timber that was available with the mill.

Q. Mrs. Nagel, do you remember when I took your deposition in our office on December 4th?

A. Yes, sir.

Q. Your counsel was present with you?

A. Yes, sir.

Q. Many questions were asked and many answers given. Do you recall these questions and these answers, referring to page 107, Mr. Romley, line 26:

“Question: Did you have any discussion with Mr. Liberman at the September 20 meeting about the acquisition of timber from Gallagher?”

“Answer: I don’t remember it, sir.”

“Question: Is it your best recollection the timber was not discussed at that September 20 meeting?”

(Testimony of Mrs. George H. Nagel.)

“Answer: I think we discussed how much timber there was, but I wouldn’t be sure about that, but we knew and he knew.

“Question: My question was too broad. What I meant with reference to the timber, did you have any discussion [89] about the purpose”—it should be purchase—“of the Gallagher timber?”

“Answer: Well, the deal that is the deal, the timber and the mill went together.

“Question: Was that discussed that the mill and the timber go together?”

“Answer: Well, it was not discussed, as I remember definitely, but the mill and the timber did go together.

“Answer: You mean ultimately go together?”

“Answer: I mean they went together when Gallagher offered us the deal.

“Question: Did you have any discussion with Mr. Liberman about the ownership of the timber if it were purchased from Gallagher as to what percentage either company would own?”

“Answer: It would be fifty-fifty.

“Question: Did Mr. Liberman discuss with you—”

Mr. Romley: Just a moment. The answer was well—

Mr. Moore: I read that. “Well, it would be fifty-fifty.

“Question: Did Mr. Liberman discuss with you the fact he already owned half the timber?”

(Testimony of Mrs. George H. Nagel.)

“Answer: No, he didn’t tell us that.

“Question: He didn’t discuss that?

“Answer: No. If he did that is news to me. [90]

“Question: There was no discussion then?

“Answer: No.

“Question: About percentage of ownership in the timber?

“Answer: That is right, there was no discussion.”

Do you remember those questions and those answers?

A. He did not——

Q. The question is do you remember me asking you those questions and you making those answers?

A. Yes, sir.

Q. Were the answers true and correct at the time you made them?

A. To the best of my ability they were.

Q. Have you given us in the questions Mr. Romley asked you, all that was said and discussed about management of this mill if it were purchased?

A. All that is significant, I believe.

Q. Well, regardless of the significance of it have you given us all that you recollect that was said about it?

A. Yes, sir.

Q. And that was solely—your recollection is that was solely, you were asked if Mr. Jenkins could manager the mill and the response you say Mr. Liberman made?

A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. Now, do you know whether or not there had been any discussion between Mr. Jenkins and Mr. Gallagher before the [91] 20th of September about Mr. Jenkins meeting Mr. Gallagher at Albuquerque on September 23rd?

A. I didn't know it was September 23rd, but I knew there had been discussions.

Q. Did you say to Mr. Liberman after some discussion after this on the 20th that you were not in a financial position at that time to buy the mill?

A. No, sir.

Q. Did you say if you had the money you would like to buy the mill?

A. No, sir. I said we were considering buying the mill, we were figuring on it.

Q. This telephone call you had from Mr. Gallagher when he made the offer to you, I believe you told me before that was either the last part of July or first part of August?

Mr. Romley: Just a moment. I object to the form of the question.

Q. (By Mr. Moore): I was doing that to refresh her recollection if it helped, not for impeachment. Is it your recollection, Mrs. Nagel, that telephone call from Mr. Gallagher was right at the last of July or first part of August, 1958?

A. I don't know when it was for sure, but I think it would be at about the middle of August.

Q. About the middle of August? [92]

A. Or along in August sometime, pretty well into August.

(Testimony of Mrs. George H. Nagel.)

Q. He gave you thirty days, I believe you said, to give him an answer?

A. He said he would like to have my answer in thirty days.

Q. If it were the middle of August the 20th of September the thirty days had expired?

A. It had not expired.

Q. Had you had any discussion with him about the expiration? A. Bob had.

Q. When did that occur, do you know?

A. I don't know the exact date, but it was when they had a hoo-hoo meeting in Las Vegas and went on to San Francisco together on a freight case.

Q. How much additional time did Mr. Jenkins obtain from Mr. Gallagher?

A. Not any specified amount of time.

Q. Were you advised by Mr. Gallagher that you had an extension of time to consider it?

A. I was advised by Mr. Jenkins that we did.

Q. Did you learn from Mr. Jenkins whether that extension was a matter of a few days, a week or a month, or what limitation there was on it? [93]

A. No, sir.

Q. You just had some extension?

A. He wanted to know.

Q. Who was there that wanted to know?

A. Tom.

Q. By Tom you mean Mr. Gallagher?

A. Mr. Gallagher.

(Testimony of Mrs. George H. Nagel.)

Q. You mean you talked about an extension and all you got from Gallagher was he wanted to know whether you wanted to buy it or not?

Mr. Romley: I object to the form of the question, if it is intended to be a paraphrase of what she said.

A. As soon as possible, sir, as I remember.

Mr. Romley: Just a moment.

The Court: I believe she has answered it.

The Witness: I am sorry.

Q. (By Mr. Moore): The answer was that Mr. Gallagher wanted to know as soon as possible?

A. Yes, sir.

Q. So there was no definite limitation then as you understood it? A. No, sir.

Q. I believe you say that by virtue of your discussion Mr. Liberman was to return to Albuquerque and prepare the written agreement for the signature of both parties? [94] A. Just as we agreed.

Q. And this meeting occurred September 20th in your offices on a Saturday? A. Yes, sir.

Q. Your discussion didn't end until afternoon on Saturday? A. That is right.

Q. Then Mr. Jenkins went over to Albuquerque on September 23rd and did sign the agreement Mr. Liberman had prepared?

A. He signed the one he had prepared, yes, not the one we had agreed on.

Q. Was it different from what you had agreed?

(Testimony of Mrs. George H. Nagel.)

A. We agreed Mr. Liberman would buy the mill and we would have the option to buy one-half interest and until April 30th to take this option up.

Q. Mrs. Nagel, isn't it a fact the only difference is in the letter and the agreement that you say you made was, first, the letter says that if either of us buy——

A. We agreed to not buy the mill, to let him buy it.

Q. Just answer my question. Isn't it true that the only differences were that it said if either of you buy and the addition of the six months extension of time——

A. If I could read the letter I could tell you for sure.

Mr. Romley: It is in evidence as Plaintiff's Exhibit [95] 3.

Mr. Moore: Would you hand it to her, please?

A. The first part: "It is our understanding you have a first refusal agreement with Arizona Timber Company to buy out their plant at Winslow and if you turn down this option it is our understanding that we are second in line to buy the plant."

That I did not know they were second in line, but, if we turned it down I understood that he would buy it.

Q. I don't want your understanding, Mrs. Nagel.

A. It says "understand."

Q. I want you to tell me the differences in that and what was agreed to in Winslow on the 20th.

(Testimony of Mrs. George H. Nagel.)

A. I say I didn't know they were second in line, sir.

Q. All right. What else?

A. "It is now mutually agreed that in case either of us, and by this is meant the company's control by the Liberman group as one party and the Nagel Timber & Lumber Company or any company controlled by the Nagel family, the second party, will take up the proposition made by Arizona Timber Company and buy out the Winslow plant from them, then our compies will have the option." We agreed that they would, that Mr. Liberman would buy the plant, that we would withdraw from the deal and he would buy the plant and timber as offered by Tom to me and then we would have an option to buy in on a [96] fifty-fifty basis at exactly the same terms and conditions as he bought the mill. We have the option to do that. Then after seven years, our agreement was, that he would sell the Winslow plant—and I mean by the plant, the plant and the timber that went with the mill to us, after seven years of operation, as a partnership. [97]

Q. After seven years of what?

A. Operation as a partnership, with Mr. Liberman, the Nagel Company and the Liberman Company, Duke City.

Q. Did you talk about the formation of a partnership?

A. Fifty-fifty, we were to buy in with him.

Q. Did you talk about the formation of a partnership?

(Testimony of Mrs. George H. Nagel.)

A. Well, I don't know what this means if it doesn't mean you'd form a partnership or a corporation or something. It's fifty-fifty basis, and that remains in force until April 30th, that was my understanding.

This option would remain in force until April 30th and this I did not know, "and will be automatically extended for six months periods until cancelled by mutual consent."

We didn't discuss that.

Q. When Mr. Jenkins left to go to Albuquerque he had authority of Nagel to sign an agreement, didn't he? A. Yes, he did.

Q. And Mr. Jenkins had authority from the Nagel to sign that agreement, the exhibit you have in your hand? A. Yes, sir.

Q. Didn't he? A. Yes, sir.

Q. And he did sign it? A. Yes, he did.

Q. Now, Mrs. Nagel, let me refer again to your deposition [98] at page 106, line 3.

"Question: Is it your contention or position, Mrs. Nagel, that the document that was signed did not set forth what you and Mr. Liberman had discussed and tentatively agreed to?

"Answer: The only thing it had in it was that in case we bought the mill, and we had agreed not to buy the mill. So that didn't make any difference.

"Question: That made no difference?

"Answer: No.

(Testimony of Mrs. George H. Nagel.)

“Question: In other words, Mr. Jenkins had authority to sign that agreement as far as the Nagel Lumber Company was concerned?”

“Answer: That’s right.

“Question: And he did sign it?”

“Answer: Yes, he did.”

Do you remember those questions asked and your making those answers? A. Yes, sir.

Q. Now, you mentioned this 7-year agreement. Did Mr. Liberman send you a letter on the 24th of September outlining an agreement with respect to that 7-year period you are talking about?

A. He sent us a letter.

Q. And he put the line on the bottom of it for acceptance by you? [99] A. Yes, sir.

Q. And you didn’t sign it, did you?

A. No, sir.

Q. I think the letter was sent as a response to a call that Mr. Jenkins made to Mr. Liberman after the 23rd, or mentioned it when he was over there or something that we don’t have?

A. At my request, yes, sir.

Q. At your request. Mr. Jenkins called him and asked him if he would put in writing what he had said about selling at the end of seven years?

A. Yes, sir.

Q. He said yes, he would, and he prepared it and sent it to you for your acceptance and signature and you did not sign it?

A. Well, he didn’t prepare it as he said he would, sir. He said he would agree to sell it to us

(Testimony of Mrs. George H. Nagel.)

after seven years and he didn't put that in the letter, sir.

Q. Is that the only reason you didn't sign it?

A. It's the only one I can remember.

Q. As a matter of fact at that time you didn't want to be obligated to buy it at the end of seven years, did you?

A. I would like to have had the opportunity, but that letter did not give it to me.

Q. You didn't want to be obligated? [100]

A. No.

Q. You simply wanted an opportunity?

A. The letter didn't give me the opportunity to buy the mill after seven years, it was not an agreement.

Q. Did you call Mr. Liberman and say, "Look, Maurice, you didn't write this letter in accordance with our understanding"? A. No.

Q. Did you ever call him and say to him, "Maurice, this September 23rd letter that Bob signed, you didn't write that in accordance with our agreement"? A. No, sir, I didn't.

Q. Have you at any time since you received the 7-year letter until right now ever said to Mr. Liberman or in his presence that, "You didn't write the letter to conform to our agreement"?

A. No, sir.

Q. Of course you were not present, as I understand it, Mrs. Nagel, when Mr. Jenkins went to-- into Mr. Liberman's office to sign the September 23rd agreement? A. No, sir, I was not.

(Testimony of Mrs. George H. Nagel.)

Q. And you were not present when Mr. Jenkins called on Mr. Gallagher that day if he did call on him? A. No, sir.

Q. To your knowledge, did Mr. Jenkins have any further [101] conversations by telephone or otherwise with Mr. Liberman?

A. Yes, he did.

Q. Between that date and October 16th, between September 23rd— A. Yes, sir.

Q. —and when was that?

A. When Mr. Liberman called him at one time, I know.

Q. And that's the conversation that has been referred to of which a typewritten transcript of what was said has been identified in a deposition, is that the one you are referring to?

A. The one where he and Tom were having trouble?

Q. Yes. A. Yes, sir.

Q. And had you ever heard of he and Tom Gallagher having trouble before that?

Mr. Romley: Now, just a moment, object to the form, he and—who are we referring to?

Mr. Moore: Mr. Liberman.

Mr. Romley: Okay.

A. Not that kind of trouble, sir.

Q. (By Mr. Moore): They had had differences, I assume, as competitors in business?

A. I guess so.

(Testimony of Mrs. George H. Nagel.)

Q. But there had been no personalities or ill will [102] developed as far as you know on the part of either one of them prior to that time, had there?

A. Well, sir, I don't have much patience with gossip so I wouldn't know about that.

Q. Mr. Gallegher had never said anything to you about Mr. Liberman prior to at least the telephone conversation we are talking about the first part of October, had he?

A. How do you mean, sir?

Q. Had he ever made any personal accusations—

A. No, sir.

Q. —to you? Then the next time that you had any conversation with Mr. Liberman, as I understand your testimony, Mrs. Nagel, was on the morning of October 16th when you received a call from him from New York City, is that correct?

A. Yes, sir.

Q. Now, do I understand your testimony correctly that at 3 o'clock in the morning you were aroused out of bed by a telephone call from Mr. Liberman and all he said was, "Send me a release of the option"?

A. Do you understand it that way? Sir, I don't know. That's not the way I said it.

Q. I say do I understand your testimony correctly in that regard?

A. No, I don't believe so.

Q. You say the call came in about 3 o'clock in the morning? [103]

(Testimony of Mrs. George H. Nagel.)

A. That's the way I remembered it. It could have been later than that, they say it was.

Q. Could it have been 6 o'clock Winslow time?

A. Well, yes, it could have been. But it woke me up. But I went back to bed and went back to sleep, so I figured it was later than 6. I didn't look at the——

Q. Now, what did Mr. Liberman say in that conversation to you?

A. He said he was in New York to buy the mill and he wanted me to send him a release.

Q. That's all he said about it?

A. Oh, he apologized when he first called, I believe, for waking me up so early and asked me to send him the release as the main thing that I remember.

Q. Well, now, is that all you remember that he apologized for getting you up, he told you he was in New York, he was negotiating or was there to buy the mill or words in that effect and, "Send me a release of your option"?

A. Of the option, yes, that's what I remember that he said. And he wanted it as soon as he could possibly have it and I agreed to send it, I agreed to send him a telegram but I didn't think I would want to give him a release. I would talk with Bob, Bob was not at home at that time.

Q. Now, is that the sum and substance of the conversation?

A. That's what I remember. [104]

(Testimony of Mrs. George H. Nagel.)

Q. And as far as you can remember. And I'm sure you have been searching your recollection for some time, at least since the deposition?

A. The main thing was the release to the option.

Q. And that's all you can recall now?

A. Yes, sir.

Q. That was said?

A. It is. It was a short conversation.

Q. Now, when was the next time that you talked to Mr. Liberman by telephone from New York?

A. I think it was the same day.

Q. Now, what time did that call come in?

A. I can't be sure.

Q. What's your best recollection as to what time it came in?

A. I just can't remember at all whether it came morning or afternoon. But it wasn't right away after that one.

Q. You have no—excuse me, I don't mean to interrupt you unless I say I do. You have no recollection at all as to whether it was in the morning or the afternoon?

A. I was at the mill when I talked to him, I'm pretty sure.

Q. You didn't have a second call from him right away?

Mr. Romley: Just a moment, just a moment, she was——

A. No, sir, I did not. [105]

(Testimony of Mrs. George H. Nagel.)

Q. (By Mr. Moore): As I understand it, you got a call, you were awakened, you went back to bed, went to sleep, got up, went to the mill and then had the——

A. No, sir.

Q. ——second call?

A. I got up and tried to get in touch with Bob. I called him at the hotel and he had left and I naturally thought he would probably be at the attorney's office for some reason, I think he was going there. Or maybe the hotel told me he was going there. So I called Mr. Cox's office and Bob was there.

Q. And talked to him? A. Yes, sir.

Q. Well, the point is, your recollection is that you did not have a second conversation with Mr. Liberman until after you got to the mill?

A. That's right.

Q. In your office. What time do you get to your office?

A. Oh, sometimes 9, sometimes 10, sometimes 11.

Q. Well, that day do you have any recollection of what it was? A. No, I don't.

Q. Sometime before——

A. I usually get there before noon.

Q. Sometime before noon anyway, is that [106] correct?

A. That's right.

Q. That was when you had a second call from Mr. Liberman?

Mr. Romley: Now, just a moment, I object——

A. I really don't know, sir.

(Testimony of Mrs. George H. Nagel.)

Q. (By Mr. Moore): Well, I thought that you said that you had a call from him that you knew you were at the mill? A. I think that's right.

Q. Did that call come in before lunch or after lunch or do you have any recollection about that?

A. What day is the 16th?

Q. I think it was on a Thursday.

A. Thursday? No, I don't, sir. I don't know whether it was in the morning or the afternoon.

Q. We are clear on this, though, are we not, Mrs. Nagel: You don't have any recollection of but one call from Mr. Liberman—

A. At home.

Q. —before this call which you made from the office or received at the office, and you don't recall what time that was?

A. I don't recall having a second call from Mr. Liberman at home.

Q. And you have related all you can recall that Mr. Liberman said to you in the first telephone call?

A. Well, the main point I remember is that he wanted a [107] release from the option.

Q. "Send me a release of the option"?

A. Yes, sir.

Q. Did he tell you how to send it?

A. Telegram, and he told me where to send it, to the Essex House.

Q. Did I understand you that you recall that he told you he was in New York to purchase the mill? A. I think he did.

(Testimony of Mrs. George H. Nagel.)

Q. Did you ask him any questions about the pending purchase? A. No, sir.

Q. You didn't say, "Well, how much are you going to pay for it?"

A. Well, I didn't ask him because I had in my mind what he would pay for it.

Q. What did you have in your mind?

A. I had in my mind that he would pay 400,000 or 500,000.

Q. In other words, that he would take up the proposition that had been made to you, or the one that had been made him, that's what you were thinking? By Gallagher, I mean, of course?

A. Or he could—whatever proposition that he took up.

Q. So when he said, "I'm here in New York to buy the mill, send me a release of your option," you didn't say, "Well, [108] Mr. Liberman, what price is it?"

A. I said, "I don't think we will want to release the option."

Q. That's all you said?

A. "But I will send you a telegram. I will talk to Bob."

Q. But you asked him no questions about the price or the terms or what he was buying or when he was going to get it or when he would take possession or how he was going to have to pay for it, you didn't ask a question about any of those subjects? A. Could I ask you a question?

(Testimony of Mrs. George H. Nagel.)

Q. I don't know whether I can answer it or not, but—

A. Well, what is an option? In my mind an option is something you can say no or yes.

Q. All right. You had an option, you say, to buy half of the deal that Mr. Liberman was making in New York. But yet you did not ask him the price or the terms or the time or anything at all about it, did you? A. No, sir.

Q. Now, did you have a—well, first, now in this second call what was the conversation then?

A. Either the second call—I can't be sure whether he just asked me to come to New York. But I told him I couldn't come, or whether he told me that the—no, I think that the second call he wanted me to come to New York and I told him I [109] couldn't come.

Q. Was there anything else in the second call, any other conversation or anything?

A. Well, I remember Mr. Liberman saying, "I need you. I need you in the deal," or something to that effect.

Q. Anything else?

A. Oh, I'm sure there must have been. I don't recall anything else.

Q. Did you ask him how much the mill was going to cost? A. No, sir.

Q. Did he tell you?

A. No, sir, not that I remember.

Q. Did you ask him what the terms were or whether it was all cash or on terms?

(Testimony of Mrs. George H. Nagel.)

A. It might have been at that—if he made two calls, at that call he told me. But I don't think so. He told me he had bought the mill, the third call, and told me what he had paid for it.

Q. Mrs. Nagel, you said if he made two calls.

A. Two or three, I don't know which he made.

Q. Oh, I see.

A. I think it must have been three, sir.

Q. Well, let's limit ourselves to the second one.

A. All right.

Q. Did he tell you how much the mill was going to cost? [110]

A. I don't believe he did.

Q. Did you ask him how much it was going to cost? A. No.

Q. Did he say anything about timber, the second call I'm talking about now?

A. I don't remember, sir. I don't think so, but I really don't know.

Q. Did he tell you anything about the price of the timber? A. No, I don't think so.

Q. Did you ask him about the price of the timber?

A. No, no, I'm sure I didn't ask him.

Q. Did he tell you whether the deal was all cash or whether it was on credit? A. No, sir.

Q. Did you ask him whether it was cash or credit? A. No, sir.

Q. Did you have any conversation other than he said, "I want you to come to New York," or "I need you in New York," or words to that effect?

(Testimony of Mrs. George H. Nagel.)

A. That's what I remember.

Q. That's all you can remember that was said by Mr. Liberman——

A. For sure.

Q. ——in a second call. Did his statement to you that, "I need you, come to New York," arouse any suspicion in your [111] mind or question in your mind as to why he needed you in New York on this deal?

A. Yes.

Q. But you didn't ask him?

A. I think I knew.

Q. But you didn't ask him?

A. No, because that wasn't our agreement.

Q. Now, have we covered, Mrs. Nagel, all of the conversation in that second telephone call that you can recall?

A. Yes, sir, to the best of my ability you have, the main point.

Q. And we have covered all that you can remember with respect to the time, it was after you got to the mill but you are not certain whether it was before lunch or after?

A. No.

Q. You are certain that the second call was the same day that you had been aroused out of your sleep by the first call?

A. Oh, I'm not positive but I'm reasonably certain that it was the same day.

Q. Do you have any recollection at all as to how many minutes were consumed in the first call?

A. It was a short call.

Q. Do you have any recollection as to how many minutes were consumed in the second call?

(Testimony of Mrs. George H. Nagel.)

A. I don't believe it was very long. [112]

Q. Was the second one as long or longer than the first one? A. A little longer, I believe.

Q. A little longer. Now, do I understand, Mrs. Nagel, correctly from your testimony that it was your position under this September 23rd agreement that it was up to Mr. Liberman to make whatever deal he wanted to make or could make in New York for the purchase of this plant when he called you?

A. It was his obligation to make the best deal he could.

Q. And you weren't interested in it enough to ask him anything about the deal he was negotiating at all?

A. I was interested in it, yes, sir.

Q. But you didn't ask him about it?

A. (No answer.)

Q. That's right? A. Is that a question?

Q. I say you didn't ask him?

A. No, I didn't.

Q. Did you have a third call from Mr. Liberman from New York? A. I think so.

Q. When did it come in? A. Late.

Q. The same day?

A. I think it was the same day, I'm not sure though. But [113] I think it was.

Q. What do you mean by late, Mrs. Nagel, the approximate hour? I don't expect you, of course, to remember the exact minute.

(Testimony of Mrs. George H. Nagel.)

A. Well, I don't know whether there was anyone in the office for sure. I don't believe there was. I think the call came from me hearing the—I'm not sure, sir. I don't know whether I answered the switchboard or it was—the call was given to me.

Q. And by given to you——

A. By the girl in front.

Q. You mean after you had gone home that someone called you?

A. No, no, the girl in front called me, I don't know. We have a switchboard and she rings my phone when I get a call. I don't know whether that was it or—I don't know whether there was someone in the office or not.

Q. Is it your recollection that that call came in while you were still at the office?

A. Yes, I was still at the office.

Q. And do you have any way of recalling what time you left the office that day?

A. No, I don't.

Q. Do you have any way of recalling whether you left about the usual time of leaving the [114] office?

A. Well, I usually—I leave late usually unless I have some reason for going early.

Q. What do you mean by late?

A. Oh, after 5.

Q. Well, then, as far as you can recall this came to you sometime after 5 or in that area, is that——

(Testimony of Mrs. George H. Nagel.)

A. No, I wouldn't say it was after 5. I'd say it was in the afternoon, it wasn't early afternoon, it was later. After the middle of the afternoon, I would think, just remembering. That's the way I remember.

Q. Now, what did Mr. Liberman say to you in that third call?

A. He said, "I have bought the mill."

Q. What else did he say?

A. He told me the price was \$650,000 he had to pay and the timber he added right away was 17, so I drew my own conclusions.

Q. Now, what did he say, if anything, about your coming to New York in that call?

A. I don't know if he asked me to come in that, I presume he did.

Q. What, if anything, did he say to you about having to make financial commitments?

A. Well, I believe there was something said somewhere in there about making financial commitments, but I wondered [115] what they were. He didn't tell me the financial commitments he had to make, but I was presuming that he was paying the cash for the mill as he said he would.

Q. When did he say that he would pay cash for it?

A. He said he could get it cheaper by paying cash.

Q. This goes back to the 20th?

A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. When you had a cash offer of \$500,000?

A. Yes, sir.

Q. And he said he could get it cheaper by using his cash?

A. Yes, sir, that's right.

Q. Did he invite you to come in and participate in the transaction in the third call?

A. I think he asked me to come to New York.

Q. Do you recall whether specifically he said, "I want you to come into this deal," or, "I invite you to come into this deal," or words which mean that he was saying he'd like to have you come in here on this transaction with us?

A. Well, I think that he wanted me to come to New York, I would naturally presume that he wanted me to come up there to participate in the transaction.

Q. In either the first or second calls that day, did he invite you to come back to New York and participate in the purchase of that property with him?

A. He asked me to come to New York and told me he was [116] buying the mill. And I don't remember the exact conversation with Mr. Liberman, if I did I could give it to you. But I really don't.

Q. In this third call when he talked about the price, did you ask him whether it was cash or terms?

A. (No answer.)

Q. For the mill, I'm talking about?

A. No, sir, I didn't.

(Testimony of Mrs. George H. Nagel.)

Q. When he said \$17 for timber, did you ask him how that was to be paid out, whether as out or reimbursement for prior deposits or anything at all about the terms of it?

A. Well, I thought it would be——

Q. No, did you ask him that?

A. I don't think I did.

Q. Did he tell you what the terms were?

A. No, sir.

Q. Did you ask him in either of those conversations, or the last one, you say that's when he told you he bought the mill. Did you ask him in that conversation what would happen to the milling contract he had with Gallagher since he had bought the mill himself?

A. No, sir.

Q. Did you ask him anything about the operation of the mill or capitalizing it?

A. No, sir.

Q. Is all [117] you said to him, "I can't come to New York?"

A. I said I was glad he had bought the mill.

Q. "I'm glad you bought the mill. I can't come to New York?"

A. That's right. I said I couldn't come to New York.

Q. And is that all you said to him?

A. I don't think that would be all, but I don't remember what else I said.

Q. What do you recall about the length of this third conversation?

A. I don't think it was very long either.

(Testimony of Mrs. George H. Nagel.)

Q. Compared to the first and second, what about the length of it?

A. I think it was about the same as probably the—as I remember it was about the same as the first one, it was a short conversation.

Q. Now, so that we may be clear and maybe the record is clear and maybe you are clear and maybe it's me that's confused, Mrs. Nagel.

Do you take the position that under this agreement you had with Mr. Liberman that he could only make a deal as outlined in the offer made to you by Gallagher? A. No, sir, I don't.

Q. Or was he free to make whatever deal he could make with them? [118]

A. To make the best deal he could.

Q. That was entirely up to Liberman then?

A. Yes, it was.

Q. Now this third conversation that we have just talked about, Mrs. Nagel, did you have any further telephone conversations with Mr. Liberman that day or the next day or within a few days thereafter? A. Not that I recall, sir.

Q. When was the next time that you saw Mr. Liberman?

A. I think the next time I saw Mr. Liberman that I remember was when we went to Mr. Johnson's office in January.

Q. And that's the distinguished looking gentleman sitting here next to me that you are referring to as Judge Johnson?

A. Yes, sir, Judge Johnson's office. [119]

(Testimony of Mrs. George H. Nagel.)

Q. Distinguished looking, I said. At that meeting in Judge Johnson's office, Mrs. Nagel, as I understand it was you, Mr. Jenkins and Mr. Cox, he was with you too? A. Yes, sir.

Q. And Mr. Liberman and Judge Johnson and those were all the people participating in the meeting?

A. They were all that were there, as I remember.

Q. And after you went in you were handed a copy of the signed contract, you asked for it and were handed it, you went in some other room and read it over? A. That is right.

Q. Then you came back into Judge Johnson's office? A. Yes, sir.

Q. And you said to Mr. Liberman, "I think you made a good deal."? A. Yes, sir.

Q. Or words to that effect? A. Yes, sir.

Q. At that time did you say to Mr. Liberman: We are now ready to exercise our option and pay you half of whatever you paid down on this and request a deed and bill of sale and other documents transferring half of that to you?

A. I didn't say it in those words.

Q. Did you say: We now offer—we now assert our right or want to exercise our option and now offer to carry [120] out our part of the 23rd agreement?

A. If I remember, I said we are ready, willing and able.

(Testimony of Mrs. George H. Nagel.)

Q. You said: We want to exercise our option and we are ready, willing and able to perform it?

A. Yes, sir.

Q. You did that in the presence of course of Judge Johnson and Mr. Liberman.

A. Yes, sir.

Q. What did Mr. Liberman say to you?

A. He said he had no obligation to us.

Q. Did he review the telephone conversations he had had with you when he was in New York on October 16th?

A. I believe he said it was a different deal.

Q. Did he review with you the telephone conversations?

A. I don't remember him reviewing the telephone conversations.

Q. Did he say anything to the effect: "Mrs. Nagel, I called you from New York, you told me you didn't want to exercise your option."?

A. No, he did not say that. He said we didn't participate.

Q. Did he tell you you refused to participate in the purchase?

A. Sir, the thing I remember he said was that he had no [121] obligation to us.

Q. Did he say: "I offered it to you and called you and advised you about it and you refused to participate in the purchase."?

A. If he did he said we had until April 30th.

(Testimony of Mrs. George H. Nagel.)

Q. Did he say that?

A. I don't remember him saying that.

Q. In other words, you had a difference of opinion there as to whether you did have an option or whether you didn't have an option to pay it as as Mr. Liberman felt, is that right?

Mr. Romley: I object to the form of the question, not what Mr. Liberman felt but what he said. It is assuming facts not in evidence.

Mr. Moore: If it assumes facts not in evidence I will eliminate them.

Mr. Romley: Speaking about how Mr. Liberman felt rather than what he said.

Q. (By Mr. Moore): Mr. Liberman said that he felt he was under no obligation to you at all?

A. He said he was under no obligation to us.

Q. You understood he was referring to the September 23rd letter agreement?

A. The option.

Q. When you say the option you are referring to the September 23rd letter agreement, aren't you?

A. Yes, sir. [122]

Q. And you said——

A. The one we made orally, yes, we did have an option still in effect.

Q. Are you suing on this lawsuit on a oral agreement or written agreement of September 23rd, 1958.

A. Am I doing what?

Q. Are you bringing this lawsuit on an oral agreement made September 20th, or are you bringing it on a written agreement dated September 23rd?

(Testimony of Mrs. George H. Nagel.)

Mr. Romley: That is asking for a legal conclusion, your Honor.

Mr. Moore: Well, I would like to know. If counsel will educate us on his theory I might be wasting time on cross examination.

The Court: I don't think it is a proper question of the witness.

Q. (By Mr. Moore): How long did the meeting last in Judge Johnson's office on January 6th, whatever date that was?

A. Oh, quite awhile. Pertaining to this, not long, but the men talked, you know.

Q. You were the only lady present?

A. Yes, sir.

Q. And you did not talk?

A. Well, sir, I did not talk much. [123]

Q. When did you next see or talk to Mr. Liberman, if you did, after the January meeting in Judge Johnson's office?

A. I don't remember seeing or talking to Mr. Liberman. I turned this over to my attorney, Mr. Cox at that time or soon after that time.

Q. You had no—what I mean was did you have any further discussion with Mr. Liberman until after the lawsuit was filed? A. No, sir.

Q. Of course you met him at deposition sessions. Mrs. Nagel, if when you say you said to Mr. Liberman in January, "I want to exercise my option and I am ready, willing and able to perform," and Mr. Liberman had of said, "Fine, we have a deal on

(Testimony of Mrs. George H. Nagel.)

that." Going back to the agreement you had, what agreement would you have had with Mr. Liberman when he accepted the exercise of your option?

A. We would have had the same agreement we had.

Q. First, with reference to the mill, what agreement would you have had with Mr. Liberman's group with reference to the mill, what would have been your obligations and his, that is what I am getting at?

A. We would have at the terms and conditions on which Mr. Liberman bought the mill and the timber.

Q. Is that all?

A. That is what the option says. [124]

Q. That is all it says, isn't it? A. No, sir.

Q. What else does it say with reference to buying in?

A. Said we would buy in on a fifty-fifty basis on which he bought.

Q. Then you would have to pay him half, I assume of whatever he had paid on the purchase price, is that right?

A. When he purchased.

Q. And you would have in some manner acquired a half interest in the sawmill?

A. Well, not in some manner, at the same terms and conditions he purchased it.

(Testimony of Mrs. George H. Nagel.)

Q. Would you have had any agreement with reference to operating the mill?

A. We didn't have a written agreement.

Q. Would you have had any agreement with reference to working capital?

A. Not at that time.

Q. Would you have had any agreement as to who was obligated to the Gallaghers to pay the purchase price? A. Yes.

Q. Who?

A. We would pay half and he would pay half on the terms and conditions of the sale.

Q. You would have been obligated to Gallagher to pay half [125] of it?

A. Have been obligated to pay half on the same terms he paid half.

Q. Would you have had an agreement with him as to how title to the mill would have been held?

A. Well, sir, that would have been worked out legally fifty-fifty. How did he buy it, that is what the option says, the same terms and conditions.

Q. I am talking about the holding of title. That would have had to have been worked out between you and Mr. Liberman, wouldn't it?

A. Why, certainly.

Q. You had no agreement with respect to whether you were going to form a corporation to hold title?

A. We had an agreement we would be able to buy in at the same terms and conditions that he bought if we wished.

(Testimony of Mrs. George H. Nagel.)

Q. You had no agreement and you had not discussed the formation of a partnership, had you?

Mr. Romley: I object to the form of the question, your Honor. That is a double question, you had no agreement——

Mr. Moore: I am talking about her interpretation.

Mr. Romley: ——and the formation of a partnership. I think it is a question that can be answered yes or no, depending on which part of it she answers.

Q. (By Mr. Moore): Going back to the question I asked [126] when you made the statement and Mr. Liberman would have said: Fine, pay over your money and exercise your option. And I asked you what agreement you would have then had, right then. Would you have had an agreement to create a partnership for the operation of the mill?

Mr. Romley: We object to that as being entirely immaterial, if your Honor please.

The Court: No, she may answer.

The Witness: What was the question, please?

(The last question was read)

A. The letter said we would own it fifty-fifty.

Q. (By Mr. Moore): What would you have done under the agreement you say you had with respect to the formation of a partnership to operate the mill?

A. I think I would have asked Mr. Cox to help us work it out.

(Testimony of Mrs. George H. Nagel.)

Q. What would you have done with respect to the furnishing of working capital for the operation of the mill?

A. Well, I don't think it would have taken much capital right at that time.

Q. Well, it would require working capital?

A. Yes, sir.

Q. Whether it was much or little. What would you have done with respect to furnishing it?

A. I would have borrowed it, I believe, from the bank. [127] That is what I usually do.

Q. What part of the working capital under your agreement with Mr. Liberman were you to put up? A. Fifty per cent.

Q. Was that agreed? A. Sure.

Q. Was that ever discussed?

A. You would have to have working capital to buy into a plant that was operating; that was the kind we were buying.

Q. Was that discussed on September 20th or written into the September 23rd letter that you would share the working capital fifty-fifty?

A. I think that we were entitled to buy fifty per cent of this plant and the timber, according to our agreement with Mr. Liberman, he was supposed to sell us fifty per cent. Now, as to how we would have worked it out, I don't think anybody knows that really.

Q. You had no agreement about the operation of it at all, did you? A. No, sir.

(Testimony of Mrs. George H. Nagel.)

Q. The only thing you had under either theory, yours or Mr. Liberman's, was an option to purchase fifty per cent of the plant, isn't that right?

A. The plant and the timber?

Q. Depending on whether plant includes timber or not? [128]

A. It does.

Q. It does in your mind?

A. It does in the deal.

Q. Then all you had was an option to buy fifty per cent of the plant and the timber?

A. Yes, sir.

Q. You had no agreement with reference to cutting timber, that's right, isn't it?

A. You wouldn't have to.

Q. You didn't have? A. No.

Q. And you had no agreement with respect to whose timber would go through this mill either, did you? A. No, sir.

Q. You had no agreement with respect to whether you would operate both mills in Winslow or only one? A. No, sir.

Q. You had no agreement as to who would pledge the assets or any security you might have to put up for working capital or other business expenses? A. No, sir.

Q. You had no agreement as to whether you would form a corporation or a joint venture or a partnership? A. No, sir.

Q. You had no agreement whatsoever with respect to if [129] one of you died the other would

(Testimony of Mrs. George H. Nagel.)

buy out or wouldn't buy out, that wasn't in your agreement, was it?

A. I don't remember it, sir.

Q. You had no agreement as to whether the timber you owned and the timber Duke City owned and what you had acquired from Arizona Timber Company would be pooled, did you?

A. No, we didn't.

Q. You in fact had no agreement about the management and operation of the mill either, did you?

A. Yes.

Q. You say that was Mr. Jenkins would manage it?

A. Yes, sir.

Q. Did you have any agreement about what his salary would be?

A. No, sir.

Q. Did you have any agreement about whether or not he would draw a bonus?

A. No, sir.

Q. Did you have any agreement about whether or not he would share in the profits of it as compensation for managing it?

A. No, sir.

Q. You have read the November 6th contract where the requirement is put in there in the agreement between Gallagher and Duke City that Duke City has the right to assign up to [130] fifty per cent of it to certain people upon condition that Duke City retain control of the management as long as the debts are owed to Gallagher, you have read that, haven't you?

A. Yes, sir.

Q. With that provision in that contract would Mr. Jenkins have managed this mill?

(Testimony of Mrs. George H. Nagel.)

A. Yes, sir. Which agreement would precede, the first one or the second one he signed?

Q. I imagine the one that required the payment of the money.

A. You think so. He agreed to let Bob operate the mill if we would withdraw and let him buy it.

Q. But at the same time you told me twice I believe that Mr. Liberman was not obligated to take up either proposition then existing or may be existing, but he was to make whatever deal he could make with Gallagher in order to acquire it?

Mr. Romley: I object to the form of the question. She said make the best deal.

Q. (By Mr. Moore): Would you agree this was not the best he could?

A. I believe that one was plenty good.

Mr. Moore: Your Honor, if it is about time for the afternoon recess I can check.

The Court: We will take the afternoon recess.

(Recess) [131]

After Recess:

Q. Mrs. Nagel, with reference to the matters we were discussing just before the recess, likewise you had no agreement with Mr. Liberman with respect to sales of lumber that might be milled through that mill, did you? A. No, sir.

Q. Now, January 6th, or whatever date that was, I think you say the 6th, when you told Mr. Liberman that you were ready, willing and able to pur-

(Testimony of Mrs. George H. Nagel.)

chase half of this, had you been back to Mr McKinney at the Valley Bank and discussed any matters with him about borrowing any money?

A. I would have——

Q. No, the question was had you been back——

A. No.

Q. ——to the bank and talked to them——

A. No.

Q. ——about any arrangements for borrowing money? A. No.

Q. Now, you have told us that Mr. Jenkins went to Albuquerque on September 23rd and told Mr. Gallagher you were not interested or you were giving up your right of first refusal. Did you ever tell Mr. Gallagher or say to him or anyone else that you were not in a financial position——

A. No, sir.

Q. ——to buy the Gallagher properties at Winslow? [132] A. No, sir.

Q. Did you ever write a letter to Mr. Gallagher in which you stated in substance: "It is really tough that we did not see our way clear to buy the operation, but the pressure would have been too terrific the first few years"? A. Yes, sir.

Q. You did write him that? A. Yes.

Q. "We certainly appreciate your advising us, your giving us the opportunity to buy it and we too are sorry we could not make the purchase."

A. Yes, sir.

(Testimony of Mrs. George H. Nagel.)

Q. And you wrote that to Mr. Gallagher on October 24th, 1958?

A. Yes, sir.

Mr. Moore: I think that's all I have now, your Honor. I may want to recall Mrs. Nagel later in the trial, but for the time being I am through.

Redirect Examination

Q. ((By Mr. Romley): Was there a reason for your writing the letter about which Mr. Moore just inquired? A. Yes, sir.

Q. What was that? [133]

A. For some reason I had an idea that Mr. Liberman was not going to let us come into the deal. I don't know whether it was on the telephone conversations or—that was October. October the what, 23rd?

Mr. Moore: 24th.

A. 24th. Tom wrote us a letter, Tom wrote me a letter, yes, he did. And I was answering it.

Q. (By Mr. Romley): Mrs. Nagel, just some questions on one brief point.

I believe your testimony is that when Mr. Liberman called you from New York on October 16th, whether it was one or two or three calls, you did not inquire as to the amount of the purchase price or how it was paid. Do you recall that testimony?

A. Yes.

Q. You did say in response to questions by Mr. Moore that you were interested? A. Yes.

(Testimony of Mrs. George H. Nagel.)

Q. But did not ask? A. No.

Q. Was there any reason why you did not ask at that time?

A. I figured we had until April 30th to——

Q. To decide?

A. ——to find out those things.

Mr Romley: That's all. [134]

Recross Examination

Q. (By Mr Moore): You had no curiosity at all that day to find them out?

A. I guess I didn't, I didn't ask him.

Mr. Moore: Just one moment, if the Court please.

That's all.

Mr. Romley: That's all. You may step down, Mrs. Nagel. Bob Jenkins.

ROBERT T. JENKINS

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Would you state your name, please? A. Robert T. Jenkins.

Q. Where do you live, Mr. Jenkins?

A. In Winslow, Arizona.

Q. How old are you, sir?

A. Twenty-seven.

(Testimony of Robert T. Jenkins.)

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. And the husband of Georgia Mae Jenkins, one of the other plaintiffs? [135]

A. Yes, sir.

Q. Is that right, sir? A. Yes, sir.

Q. Mr. Jenkins, how long have you been associated with the Nagel Lumber and Timber Company?

A. As an employee or as a partner, sir?

Q. Well, from your first association?

A. Since 1952 that would be.

Q. And in what capacity were you first associated?

A. As an employee on a part time basis.

Q. And how long did you remain as an employee on a part time basis?

A. For, I believe, about a year.

Q. Then did you become an employee on a full time basis?

A. No, sir. I was in school at the time and for about a year I was working part time and going to school, and then I started going to school year 'round. So I quit my part time employment.

Q. Where were you going to school at that time?

A. For the first two and a half years at Arizona State College at Flagstaff, and for the last year Montana State University, Missoula, Montana.

Q. In Montana State University?

A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. Did you specialize in anything there? [136]

A. In business administration, yes.

Q. After you finished your school did you re-sume your employment with the Nagel Lumber and Timber Company? A. Yes, sir.

Q. And about when was that?

A. That was July—I believe it was June the 13th, rather, 1955.

Q. In what capacity were you associated then?

A. As the production manager of the plant.

Q. And how long did you continue as the production manager at the plant?

A. Until about January, 1957.

Q. Did your position change at that time?

A. Yes, sir.

Q. And what was the change?

A. I was made the assistant manager.

Q. And Mrs. Nagel, I assume at that time was the manager, was she? A. Yes, sir.

Q. Are you still in the same capacity so far as management is concerned, assistant manager?

A. Yes, sir.

Q. But at the outset of that employment in January of '57 it was in the capacity of an employee only, is that right? A. Yes, sir. [137]

Q. At that time the business was owned by Mr. and Mrs. Nagel, is that correct, sir?

A. Yes, sir.

Q. Was Mr. Nagel devoting any of his time to the operation of the business then?

(Testimony of Robert T. Jenkins.)

A. The actual management of the concern on the spot, no, sir.

Q. And was that carried on entirely by Mrs. Nagel with your assistance? . A. Yes, sir.

Q. Now, I believe the testimony here indicates that as of October 1st, 1957, a partnership was organized?

A. On or about that time, yes, sir.

Q. And you are one of those partners?

A. Yes, sir.

Q. Since the formation of the partnership have you taken a more active part in the operation and management of the business or has it been substantially as it was since January of '57?

A. Well, I would say that I have a much greater interest in the business but I am as involved now as I was any time I was assistant manager.

Q. Would you speak a little louder, Bob?

A. Yes, sir. Would you like for me to repeat my answer?

Q. Yes, I didn't quite get all of it. [138]

A. I am interested to a greater extent in the business because I participate in the profits naturally. But I devote no more of my time to its operation than I did before.

Q. You are still the same assistant manager you were before? A. Yes, sir.

Q. How familiar have you become with the operation of that business, Bob?

A. Well, sir, I have devoted the last four years full time to its operation and I don't qualify as an

(Testimony of Robert T. Jenkins.)

expert, but I think I know a little bit about its operation and management.

Q. Now, during the last four years have you become acquainted with Tom Gallagher?

A. Yes, sir.

Q. And with Maurice Liberman?

A. Yes, sir.

Q. Do you recall approximately when it was that you first met these men?

A. I believe the first time I met Mr. Liberman was in our office in Winslow in 1955. Now, I'm not sure of that. And Mr. Gallagher I had known since about 1953, or possibly even earlier than that. I worked for the New Mexico Timber Company as an employee one time and I knew Tom Gallagher when I saw him.

Q. I see. Was the New Mexico Timber Company one of the [139] Gallagher companies?

A. Yes, sir.

Q. And its principal place of business is where?

A. It was in Albuquerque, I believe.

Q. I see. Mr. Jenkins, bringing you down to the negotiations with regard to the sale of the Gallagher properties, do you know whether there were negotiations with regard to that subject matter between Gallagher and the Nagels?

A. At what time might I ask?

Q. Well, in the year 1958 at any time?

A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. When did that matter first come to your attention if you recall?

A. I believe it was in August, we were discussing merger with the Gallagher companies earlier that year, I believe. And let me think. Yes, that's right. And that deal was called off and Tom called in August, told Mrs. Nagel—

Q. Well, I'm not going to ask you what he said to her if you didn't hear it. Did you hear that conversation?

A. No, sir, I did not.

Q. It was related to you later?

A. Yes, sir.

Q. Now, did you, after that conversation, have any discussions regarding the matter with Tom Gallagher? A. Yes, sir. [140]

Q. When and where did those discussions take place?

A. Well, the first discussion took place over the telephone and I was at home, Tom Gallagher called me in early September, I believe, and asked me how we were getting along with our plan to buy the plant, if we were going to. And I told him that Mrs. Nagel was talking with the bank. He said that he was going to Las Vegas to a Hoo-Hoo meeting.

Q. Spell that for the reporter?

A. H-o-o H-o-o.

Q. Is that a lumberman's organization of some kind?

A. That's a lumberman's organization, yes.

(Testimony of Robert T. Jenkins.)

Q. A Hoo-Hoo convention?

A. Yes, sir, a convention in Las Vegas, their annual convention. And he said he would meet me there and we could discuss the matter in any detail that we cared to at that time, if I was going. And I told him that I was going.

Q. Did you go to that convention?

A. Yes, sir.

Q. Do you remember when it was held that year?

A. Well, I don't remember the exact date. It was either September the 15th, 16th or 17th, I believe. Within two days.

Q. Of the year 1958? A. Yes, sir.

Q. Did you see Mr. Gallagher at that convention? A. Yes, sir. [141]

Q. What were the discussions you had with him at that time with regard to this purchase?

A. Well, at the outset he wanted to know if we were ready to—if we were going to exercise our option and I told him that we hadn't had sufficient time, that there were a lot of matters that we had to look into before we could purchase it. And gave him some examples, such as finding a market for the additional product that we'd have to move. And I told him we were probably going to have to have more time than he had given Mrs. Nagel in their original conversation as related to me.

Q. Was that the 30 days that she testified to?

A. Yes, sir.

Q. What did he say in response to your statements?

(Testimony of Robert T. Jenkins.)

A. Well, he said he would like to know as soon as possible that they were going to liquidate this property.

Q. Then was there any time limit fixed in days or weeks or by date or anything of that sort?

A. I told him that when I returned from San Francisco, where we were attending a rate hearing, that I would get with Mrs. Nagel and I would try to get in touch with him the next, the following week. But I told him that I would just call him and tell him where we were, I wasn't going to call him and give him a yes or no answer at that time.

Q. And that was with regard to the proposed sale and [142] purchase of the properties?

A. Yes, sir.

Q. And what did he say when you told him that?

A. Well, he—I don't recall what he said when I told him this. But he was wanting us to go ahead and tell him what we were going to do.

Q. I see. Then from the convention did you go to San Francisco as was contemplated?

A. Yes, sir.

Q. Did you go alone? A. No, sir

Q. Was Mr. Gallagher with you?

A. Yes, sir, I was in his plane.

Q. All right. Was it at that time that you had this discussion or was it before you left Las Vegas?

A. It was before we left Las Vegas.

Q. Were there any discussions after you left Las Vegas and either going to San Francisco or on the

(Testimony of Robert T. Jenkins.)

way back that you had any further discussions with him?

A. Not that I directly recall. In fact I think that we completely stood away from discussing the subject since we had a competitor of ours in the plane with us at the time.

Q. You were in Tom's plane? A. Yes, sir.

Q. Then do you recall when you returned to Winslow? [143]

A. I don't recall the exact time, I believe it was on Friday, the 19th. Now, I believe it was, yes, sir.

Q. Did you, up to that time did you still have your right of first refusal?

A. Yes, sir, in fact Mr. Gallagher didn't want us to come up with the cash, he wanted us to come up with a yes or no answer as soon as we possibly could. And I assume——

Q. That's what he told you? A. Yes, sir.

Q. Now, were you present at the meeting in Mrs. Nagel's office on September 20th, 1958?

A. Yes, sir.

Q. Maurice Liberman was there?

A. Yes, sir.

Q. Had you talked to him prior to that meeting?

A. I had talked to him prior to that, but what——

Q. Well, I mean a day or two prior to that?

A. To the best of my recollection I did not, no, sir.

(Testimony of Robert T. Jenkins.)

Q. Did you see him at the Hoo-Hoo convention, was he there or do you recall?

A. I don't believe he was there, I don't—

Q. Now, then, is it correct to say that you hadn't talked with Mr. Liberman for some time prior to September 20th, 1958?

A. Substantially correct, yes, sir.

Q. All right, sir. Where and when and about what time was [144] it that you saw him on September 20th?

A. I picked him up at the airport.

Q. Was that by any prearrangement?

A. Yes, sir.

Q. At whose request was that done?

A. At his own request, I believe. He had talked to Mrs. Nagel and told her that he was coming in.

Q. Did he arrive by private or commercial plane?

A. Private plane, commercial charter.

Q. Chartered plane? A. Yes, sir.

Q. From Albuquerque? A. Yes, sir.

Q. Do you remember, Bob, about what time it was that you picked him up at the Winslow airport.

A. Well, it was in the morning I know. But I don't recall the exact time. It was either somewhere around 10 o'clock.

Q. Did you go directly from there to the Nagel office? A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. Before you arrived at the Nagel office, did he tell you the purpose of his trip to Winslow?

A. Not that I recall, no, sir.

Q. Did you take him back to the plane to return to Albuquerque? [145]

A. Yes, sir.

Q. Do you remember about what time that was?

A. I should think about somewhere in the vicinity of 3 or 4 o'clock in the afternoon.

Q. Did you go directly from the airport to Mrs. Nagel's office?

A. Yes, sir.

Q. And the three of you took part in a discussion?

A. That's right, yes, sir.

Q. Did anyone else take part in any of that conversation?

A. No, sir, there was a girl in the office but she was in the front office, she left at noon and that's the reason I know he got there in the morning.

Q. And he left after the girl left at noon?

A. Right.

Q. This was a Saturday, I believe, is that right?

A. Yes, sir.

Q. The office normally is closed at noon on Saturday?

A. Yes, sir. [146]

Q. Do you recall substantially all you think of the conversation that took place in Mrs. Nagel's office that morning and that afternoon?

A. I recall certain parts of certain ones that I thought were important at the time.

(Testimony of Robert T. Jenkins.)

Q. Will you tell us, please, just what transpired when Mr. Liberman first came into the office, walked in with you because you had picked him up? Mrs. Nagel I assume was there?

A. Mrs. Nagel was there. Of course the normal salutations were passed the first thing.

Mr. Moore: Your honor, for the record I assume our original objection is going to all this?

The Court: Yes, your objection may go to all of this.

Q. (By Mr. Romley): Starting over again.

A. Yes. He came in the office, of course the normal salutations were passed and I think we discussed market conditions and a few things of that nature and finally Mr. Liberman got around to the reason for his visit, what I concluded was the reason for his visit, he asked Mrs. Nagel if we had bought the plant.

Q. You will have to be more specific, which plant are you talking about? [147]

A. The Gallagher plant, the plant Gallagher had offered Mrs. Nagel. She told him no we hadn't that we were working on it, we were looking into the financial commitments we would have to make.

Q. Was it a fact at that time you were still considering it? A. Yes, sir.

Mr. Liberman said he had been offered the plant also and that the price to him was \$500,000, I believe he said 500,000, but that he heard the price was going to six, that he thought they were going

(Testimony of Robert T. Jenkins.)

to raise the price to 600,000. And that he had a great interest in it because he owned some Aztec timber that he had to get milled in some sawmill in the area and he said, "why don't we buy it together," or words to this effect, since we both had an interest in it. Mrs. Nagel said, "Maurice, do you think we could get along?" Mr. Liberman said, "I don't see why not, Mrs. Nagel. For some reason I feel you don't like me." Mrs. Nagel said, "we don't dislike you but our dealings haven't always been completely satisfactory." She said, "we shipped you some lumber that we have had complaints on and had adjustments and we haven't been able to get along. Do you sincerely think we can get along together if we buy this together." You understand, Mr. Romley, I might be adding a word or two, this isn't verbatim, but—— [148]

Q. Is this the substance?

A. This is the substance of what was said.

Q. That is all we can expect. Go ahead.

A. Mr. Liberman said, "You know as a company first starts sometimes they get off on the wrong foot, but they progress and get to know people better and they quit making mistakes. They do things when they are young that they don't do, typical of any young institution or young person." He said, "We have changed quite a lot, I think we can get along together." Mrs. Nagel said, "Well, we want the whole plant." Mr. Liberman said, "I am interested in this only for a period of seven years. I need the production from this plant for seven years

(Testimony of Robert T. Jenkins.)

to sustain my other operations." He said, "At the end of that time my children will be grown up to a certain degree and I won't have—they will be in school or out on their own," words to this effect, "and I can sell you my half interest at the end of this seven year period." Mrs. Nagel then—let's see—then Mr. Liberman, in the course of this conversation had said that he thought he could buy the plant for \$100,000 less than we could and that we should let him negotiate for the sale of the plant. Then we got around, Mrs. Nagel got around to asking him, she said, "Who would——" First, she said, "We have got to have the timber that is behind this mill to sustain our level of operation in this mill after the Aztec timber is complete. That is all we are interested in. [149] If seven years is all you are interested in then this will be a real good arrangement for us, for both of us." She asked Mr. Liberman would he be agreeable to Bob managing it; he said, "Yes." He had a few reservations as I recall, except he mentioned he was going to employ Mr. Yale Weinstein in Albuquerque.

Q. Yale Weinstein at that time was an employee of Gallagher?

A. According to Mr. Liberman. We asked him if Mr. Weinstein was working for Liberman and he said no.

Q. Had he been working for Gallagher?

A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. In Winslow or Albuquerque?

A. In Albuquerque, but managed the Winslow plant by long distance.

Q. He said something about employing Yale Weinstein when Mrs. Nagel said—

A. Something to the extent that he was going to employ Yale and he knew Yale and I could get along together and Yale would represent the Duke City group if we consummated this deal completely. As I recall it this was the substance, the way Mr. Weinstein was discussed. I think we did pass lightly over our logging operations, the similarity of the two and possibly some other minor items that would be of interest to the operation if this deal was consummated, but I don't recall [150] anything specific.

Q. Before the conference broke up had the parties reached an understanding as to what was to be done?

Mr. Moore: I object to that as calling for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Romley): Now tell us what more transpired, if anything did after these events took place?

A. About this time Mrs. Nagel—of course you understand this took a period of three or four hours to go through, is my recollection. Mrs. Nagel said, "can Bob and I step outside a minute?" Mr. Liberman said, "certainly." We stepped outside and she said to me, "I think this is a good deal." I said,

(Testimony of Robert T. Jenkins.)

“I can’t see any reason why we shouldn’t go along with it.” We went back in and told Mr. Liberman we would be willing to go along with his deal, we would give up our first option, right of refusal, rather.

Q. You mentioned right of refusal earlier?

A. Right.

Q. Was that a subject of discussion or mentioned at all in that conversation before this time?

A. Yes, sir, it was mentioned.

Q. How did that come up?

A. Mr. Liberman, when he told us he was negotiating for the mill, he was negotiating with Gallagher for the mill, told [151] us he knew of our right of first refusal and recognized it and said if we went along with this deal he would either step out of the picture completely and exercise this right.

Q. Did he request you in any way to do anything with regard to your right of first refusal?

A. May I answer you this way?

Q. Yes.

A. When we came back in the office Mrs. Nagel said, “we will go along with you and Bob will go over to Albuquerque and see Tom and tell him we do not want to purchase the plant and exercise our right of first refusal.” And he suggested that I call Mr. Gallagher. I believe he suggested I call him. Mrs. Nagel or I one said that I had to go over and talk to him for personal reasons, we had to thank him very much for giving us this first op-

(Testimony of Robert T. Jenkins.)

portunity as he said he would. He said, "when you go over, come by my office——" I am getting ahead of myself. He said, "when you go over don't tell him I was here because knowing Tom, and I draw this as an inference, Tom will get upset."

Q. Who said that?

A. Mr. Liberman. Somebody mentioned putting the agreement we had reached in writing.

Q. Before we get to that agreement, Bob, who first suggested that you or the Nagels give up the right of first refusal? [152]

A. Mr. Romley, I really honestly can't say whether we mentioned giving it up first or Mr. Liberman mentioned it.

Q. In any event, the conversation transpired as you said and you were to go and tell Tom that instead of calling him, is that right?

A. Yes, sir.

Q. Now, before that conference broke up on September 20th, did Mr. Liberman and you and Mrs. Nagel say anything—and please answer this just yes or no—to indicate the parties had reached an accord or understanding or agreement?

A. Yes, sir.

Q. Tell us just what was said in that regard.

A. That when I came to Albuquerque——

Q. Tell us who said what, Bob.

A. Well, it transpired like this. One of us, Mrs. Nagel or I, mentioned the fact we had no girl in the office, it would be rather difficult for us to type up any sort of an agreement that we would reach

(Testimony of Robert T. Jenkins.)
today. However, we would agree that we have agreed to purchase the plant on this **fifty-fifty** basis and we would get out of the picture completely, we would exercise our first right of refusal, and when I came to Albuquerque Tuesday Mr. Liberman and I would write up some sort of agreement to commemorate the fact that we had reached an agreement.

Q. What precisely was the agreement that was reached [153] there in Mrs. Nagel's office, what was each party to do?

A. The agreement was that Nagel Lumber Company was to give up their right of first refusal——

Mr. Moore: I object to the statement of what the agreement was and insist it be limited to conversation.

The Court: The Witness should tell what the conversation was, who said what.

The Witness: Do I understand I am to say who said what?

The Court: Yes, as near as you can recall. You are not expected to do the impossible, but as near as you can put it, the substance or words, what the parties said.

A. We said we would exercise our first right of refusal.

Q. (By Mr. Romley): When you say "we"——

A. Mrs. Nagel and myself.

Q. When you say you would exercise your first right of refusal——

(Testimony of Robert T. Jenkins.)

A. We would go to Tom Gallagher and tell him we would not purchase the plant under the terms he had offered it to us.

Q. That was what the Nagels were to do?

A. That was what the Nagels were to do, yes, sir.

Q. What more was said with regard to what the Nagels were to do or what more Nagel was to do?

A. Mr. Liberman was to purchase the plant if at all [154] possible and when his deal was completed Nagel Lumber Company was to be given the option of purchasing in his deal on the fifty-fifty basis, and at the end of seven years he was to sell the plant to Nagels. Nagels had no obligation to buy the plant at the end of seven years nor did they have an obligation to buy on a fifty-fifty basis.

Q. Was there any discussion as to the time within which the Nagels—and I say Nagels, it is really the partnership of which you are a member, Nagel Lumber & Timber Company—was there any discussion of time within which this option to buy in on the fifty-fifty basis would have to be exercised?

A. Yes, sir.

Q. Tell us what was said in that regard and who said it.

A. I said to Mr. Liberman that if they consummated the purchase in the late fall or winter we would most probably not have cash resources to buy in on a fifty-fifty basis because our money would be tied up in logs and lumber inventories. I said that we should have our money out of these

(Testimony of Robert T. Jenkins.)

logs and lumber by April 30th and asked him if he would be agreeable to us having until April 30th to exercise this option to purchase into his deal and he said yes.

Q. Mr. Liberman said yes? A. Yes, sir.

Q. You told us something about the discussion regarding your managing the plant. Did Mr. Liberman say anything at [155] that conference to indicate whether or not he was willing to have you do so?

A. Yes, sir, he indicated.

Q. Tell us what he said.

A. He said he had watched my progress in business and that he thought I was doing very nicely and he had a certain amount of confidence I would be able to handle the job and he would certainly have no fear or no reason for me not to manage it, in fact he was receptive, very receptive to the idea.

Q. Did you know at that time he had, Liberman had on behalf of Duke City a contract with Gallagher for the milling of his Aztec?

A. I did not, no, sir—I'm sorry, for the milling of his Aztec?

Q. Milling of his Aztec?

A. Yes, sir, I knew that. I am sorry, I was confusing contracts.

Q. There was another contract which you learned later he had with them?

A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. What was that?

A. That was a letter contract to purchase the mill for half a million dollars that has been referred to.

Q. That September 11 or 12 letter? [156]

A. Yes, sir.

Q. You did not know about that at that time?

A. No, sir, I did not.

Q. You did know he had a contract or milling agreement with Gallagher for milling his Aztec?

A. Yes, sir.

Q. Was the subject of milling Duke City Aztec discussed in this conference of September 20th?

A. Yes, sir.

Q. Tell us what was said in that regard?

A. Mrs. Nagel I believe told Mr. Liberman we would have to have that timber in that mill. He said that was the reason he wanted to go in this deal, he needed the mill to mill this timber. She said, "would it be on the same terms you are paying Tom?" And he I believe said something about, "no, I would like to pay \$2 rather than 3," and Mrs. Nagel said, "Maurice, we had the opportunity before to mill this at \$2 and turned it down. That is too cheap now, isn't it?" And Mr. Liberman agreed yes, that was too cheap, that \$3 would be a reasonable amount. And as I recall it, that was the extent of the conversation.

(Testimony of Robert T. Jenkins.)

Q. When you spoke of \$2, I believe that milling agreement is in evidence, is it not. There are some four or five supplements attached thereto. That is this Exhibit 5.

Is that the agreement, Exhibit 5, to which you have [157] referred as the milling agreement between Liberman or Duke City and Gallagher?

A. Yes, sir, I believe it is.

Q. You have referred to a \$2 item and its discussion and then \$3. Does the agreement provide for the payment of certain sums of money for certain things to be done?

A. Yes, sir, it does.

Q. And I believe the agreement in evidence shows there was \$75,000 a year to be paid by Duke City toward the overhead expense, general overhead; \$4.33 per thousand feet for depreciation and \$3 per thousand feet for profit?

A. Yes, sir.

Q. All other milling costs to be paid by Liberman, is that right? A. Yes, sir.

Q. Is that \$3 item of profit the one to which you have referred?

A. Yes, sir. All the other items were to have remained the same.

Q. The only discussion with regard to the amount of the item was Liberman has to reduce the \$2 profit item to——

A. From \$3 to \$2.

Q. From \$3 to \$2?

(Testimony of Robert T. Jenkins.)

A. Yes, sir. He just mentioned it. He didn't state, he said he thought it should be \$2. [158]

Q. Did the parties reach an agreement with regard to the continuance of this milling agreement under the new purchase if one should be consummated?

A. I would have to answer no, sir. Mrs. Nagel did tell Mr. Liberman that the timber would have to go through the mill to keep it on an economical basis, the basis at which it was at that present time operating.

Q. The Aztec timber provided for by this Exhibit 5, is that right? A. Yes, sir.

Q. When Mrs. Nagel told Mr. Liberman that, it would have to go through this mill, what did he say?

A. He said, "well, it should be—the price should be \$2." And Mrs. Nagel said, "Maurice, we have discussed that before and \$2 is too cheap, isn't it?" He said, "Yes," or words to the effect and as I recall that was the extent of the conversation concerning this milling contract.

Q. Now, did you have any further conversation you recall on that day, Bob, with regard to this matter? A. I don't recall it.

Q. After the conference broke up, you took Mr. Liberman to his plane?

A. Yes, sir, and I believe I went back to the office, I'm not sure.

(Testimony of Robert T. Jenkins.)

Q. Had any arrangements been made with regard to seeing [159] Liberman at a later date?

A. Yes, sir.

Q. When was that to be?

A. I was to go to his office in Albuquerque when I went to see Tom to exercise our right of first refusal, and at that time he and I were to draw up some sort of a paper stating in substance our agreement.

Q. "He and I," you mean Liberman and you?

A. Liberman and myself, yes.

Q. Was a time fixed for that meeting?

A. I don't believe so, Mr. Romley, but I can't be sure. I do not know how I arranged the schedule to go to Albuquerque.

Q. Did you go to Albuquerque? A. Yes.

Q. When? A. September 23rd, Tuesday.

Q. That is the Tuesday following this meeting on the 20th? A. Yes, sir.

Q. Did you see Mr. Liberman on that day?

A. I did, yes, sir.

Q. Did you and he prepare an agreement?

A. No, sir.

Q. Was an agreement prepared or a letter memorandum of any kind prepared when you arrived there? [160] A. Yes, sir.

Q. Was it prepared in your presence or had it already been written up?

A. It had already been written up.

Q. Tell us what was said with regard to that subject matter?

(Testimony of Robert T. Jenkins.)

A. With regard to the agreement?

Q. Yes.

A. I went into Mr. Liberman's office. I had an appointment with Tom Gallagher I believe at 10:00 o'clock. I went into Mr. Liberman's office between 9:00 and 10:00 with Mr. Nelson, our comptroller. We went into Mr. Liberman's office and Mr. Joe Grevey was present. Mr. Liberman had already written the agreement and he handed it to me. Mr. Grevey got a call. I read the agreement, I believe there were two or three copies, I am not sure, and handed it to Dale Nelson, our comptroller that was with me. He read it through and I realized it was not in substantially—it was what we had agreed on but it was changed somewhat. And I asked Dale if he thought the changes would affect us materially, and the two of us concluded I believe no and I signed the letter without protest and went from there to Gallagher's office.

Q. You left signed original or copies with Liberman and took a copy or the original with you?

A. I had a copy. I don't recall if it was the original [161] or not.

Q. Was anything said before you went to see Gallagher regarding your seeing him, Mr. Liberman say anything about it?

A. Yes. He wanted to know if I was going to see Tom; I said yes. He said, "when you see him, after you see him and before you leave, give me a call and tell me what he said and what you said."

(Testimony of Robert T. Jenkins.)

Q. You did leave there and did see Gallagher?

A. Yes, sir.

Q. What did you tell Gallagher?

A. I told Gallagher that we did not want to purchase the plant; we appreciated very much his giving us the first refusal as per our agreement, we were sorry we couldn't do it. Do you want me to say everything that I said to him?

Q. With regard to the first refusal. Was that the entire subject?

A. In substance, yes, sir. He wanted to know why and a few things.

Q. Did you call Mr. Liberman as he had requested you to do?

A. Until the last week I thought I had called him, but I recall now that Mr. Nelson I believe is the one that placed the phone call from the airport.

Q. That same day, September 23rd?

A. Yes, sir. [162]

Q. Were you present when he called?

A. No, sir. I don't remember why I couldn't call, but we were in a hurry or something, I was doing one thing and Mr. Nelson took on the job of calling Mr. Liberman.

Q. You got out there and realized you hadn't complied with the request? A. That is right.

Q. Did you go directly from Albuquerque to Winslow again? A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. Have a further discussion with Mrs. Nagel or show her the memorandum that had been signed?

A. I did.

Q. Did you have any conversation later that day or the following day with Mr. Liberman?

A. I called him up the following day, I believe.

Q. That would have been September 24th?

A. Yes.

Q. What was the purpose of that call, Bob?

A. Mrs. Nagel pointed out that Mr. Liberman neglected to put a clause in the agreement that we signed saying he would sell us the mill in seven years, as he had agreed to do on the 20th. I called Mr. Liberman and he said it was an oversight and he would send us a letter stating that fact.

Q. At the end of the seven years he would sell you what? [163]

A. He would sell us his remaining half interest in the plant, if he purchased it and our original fifty-fifty deal was consummated.

Q. In other words, in the original purchase you would own fifty-fifty and he would, after seven years, sell that mill, his fifty per cent to you?

A. Yes, sir.

Q. When you speak of plant as you have on occasions and I have in my questions, tell us what is meant by that term?

Mr. Moore: We object to that as calling for a conclusion of the witness. Let him answer what was discussed in this agreement as to what "plant" meant.

(Testimony of Robert T. Jenkins.)

The Court: The objection is sustained.

Q. (By Mr. Romley): At the time of this meeting on September 20, 1958, did the Nagel Company own a sawmill and plant?

A. Yes, sir, in Winslow.

Q. Did it also have some timber rights to Aztec timber and Forest Service timber under contract?

A. Yes, sir.

Q. At that time did the Nagel Company have any need for a plant as such?

Mr. Moore: We object to that, if your Honor please. They have already testified they were negotiating to buy the [164] plant.

The Court: He may answer.

Q. (By Mr. Romley): Did the Nagel Company have any need at that time for just the physical plant itself?

A. No, sir, definitely not.

Q. What was it you were negotiating for with Gallagher?

A. We wanted the position that his mill represented in the forest.

Mr. Moore: We object to that as a conclusion and ask that it be stricken as not responsive. He was asked what he negotiated for and he said this is what he wanted.

The Court: It may stand.

Q. (By Mr. Romley): When you say "position in the forest" tell us, sir, we are not foresters here, so we may understand exactly what you mean.

(Testimony of Robert T. Jenkins.)

A. The position in the forest is in lumbermen's language commonly referred to—commonly supposed to be the area that a mill takes timber from, that a particular physical machinery set up as a plant takes timber from this one particular area and processes it through the plant. The position in the forest means the position of this particular timber and the right to purchase into it.

Q. Right to acquire timber? A. Yes.

Q. I believe the testimony is that there are two mills [165] in Winslow? A. Yes, sir.

Q. Have been now for at least ten years?

A. Yes, sir.

Q. Are the two mills supplied from the same forest? A. Yes, sir.

Q. That is Sitgreaves National Forest?

A. Yes, sir.

Q. Are there any terms that are used with reference to parts of the forest that supply each mill?

A. Yes, sir.

Q. What is that term?

A. A working circle.

Q. How many working circles are there in Sitgreaves National Forest.

A. I really don't know the number. There are more than one.

Q. How many working circles in the Sitgreaves National Forest provide timber, that is Forest Service timber to the Nagel mill?

A. Basically one working circle.

(Testimony of Robert T. Jenkins.)

Q. And how many working circles are there in the Sitgreaves National Forest that supply Forest Service timber to the Gallagher mill now operated by Duke City? A. The same one. [166]

Q. What is the name of that working circle?

A. Chevalon working circle.

Q. Do you know whether in the past any particular portion of that working circle supplies U. S. Forest Service timber to either one of these plants or just to get it indiscriminately from the entire working circle?

A. It is theoretically divided or has been in the past and prior to the acquisition of the Aztec timber in half, one half of all sales he made was put up in this particular area and the other half of the sales of the other plant in Winslow is put up in its respective area.

Q. In September, 1958, the Gallagher mill has its position in the forest, meaning its timber rights, precedent and long establishment, to substantially one-half of the Forest Service timber in that circle, is that right?

A. Yes. They had a gentleman's unwritten, un-verbal, certainly no kind of agreement, but a gentleman's position in the forest in that the competition in the local area did not participate in the bidding in the sales put up in the one particular area of that plant.

Q. Through the years had Nagel Company bid on timber that was put up for the Nagel mill?

(Testimony of Robert T. Jenkins.)

Mr. Moore: I object to that as immaterial.

The Court: He may answer. [167]

A. No, sir, we had never bid on their timber sales.

Q. And had Gallagher people ever bid on your timber?

A. No, sir, they had not to the extent of my knowledge.

Q. I believe there was a sale just this past month, wasn't there? A. Yes, sir.

Q. And from what part of the working circle did that come, was it Nagel or the Duke City, formerly Gallagher part?

A. I would refer to it as—it was put up for the Nagel plant, but it was in the Gallagher portion.

Q. I see. But put up for the Gallagher plant?

A. For the Nagels' plant.

Q. For the Nagels' plant?

A. Yes, sir.

Q. Did Duke City or anybody bid against you at that sale?

A. No, sir, they did not.

Q. Part of this unverbal, as you say—

Mr. Moore: We object to that as leading and suggestive and a conclusion and irrelevant.

The Court: It is leading.

Q. (By Mr. Romley): Is there another—I started to say batch, but that isn't the right word, another amount of timber to be put up for sale this month in the Sitgreaves National Forest?

(Testimony of Robert T. Jenkins.)

A. I understand there is, yes. [168]

Q. In the Sitgreaves—in the Chevalon working circle?

A. Yes, sir.

Q. And is that put up for the Nagel mill or for the Duke City mill?

A. For the Duke City mill.

Q. Does Nagel intend to bid that sale?

A. Definitely not.

Q. Mr. Jenkins, when did you next have any conversation—I'm speaking after September 24th, 1958—with Mr. Liberman regarding the Gallagher properties?

A. To the best of my knowledge in the early part of October on the telephone.

Q. Where were you and he at the time?

A. I was in my office and I assume that he was in his office.

Q. In the course of that conversation were you asked to release the option that had been granted under the agreement of April—or September 20th or 23rd? Did that subject come up?

A. No, sir.

Q. To your knowledge was the Liberman group ever released from the obligations of that option?

Mr. Moore: We object to that as calling for a legal conclusion, if your Honor please.

The Court: He may answer as far as his knowledge goes. [169]

A. No, sir; they were never released.

(Testimony of Robert T. Jenkins.)

Q. (By Mr. Romley): Did you ever say to Liberman or anyone connected with him that Nagel Lumber and Timber Company would release him from that option? A. No, sir.

Q. Now, when after October, 1958, did you have any further conversation with Mr. Liberman regarding this subject?

A. To the best of my recollection, Mr. Romley, it was at the airport in Phoenix.

Q. Can you tell us approximately when that was?

A. It was between October and December 25th, it was during the time that Southwest Lumber Mills was having a trial over the Aztec crews in Prescott, and I don't recall the exact date.

Q. That was between October, '58, and December 25th, '58, I believe you said?

A. I believe that is the time.

Q. Who was present other than you and Liberman?

A. When he and I talked, no one.

Q. What was said by each of you regarding this matter?

A. I saw him in Phoenix, we had rode down with Tom Gallagher to Phoenix in Tom's plane.

Q. From the trial at Prescott, was it?

A. From Prescott, yes, sir. And Mr. Liberman had to catch a plane, if I remember right he had been in the hospital or had [170] been sick, had been ill. And we had been unable to contact him, if we had tried. I don't recall whether we had tried

(Testimony of Robert T. Jenkins.)

or not. But he had been ill and I talked to him in front of the American Airlines ticket counter and told him that we would like to talk with him at his earliest convenience on that subject. And his reply was——

Q. Regarding this option, you mean?

A. Yes, sir, on the purchase-sale agreement.

Q. What was his response? A. Sir?

Q. What did he say?

A. He said, "Well, give me a call." He told me that he had been sick and said, "Well, I'll be in the office now for a while, and in a day or two give me a call."

Q. And did you call him?

A. I don't recall whether I called him in a day or two, but I did call him subsequently.

Q. You did talk with him again over it?

A. Yes, sir.

Q. Over the telephone?

Q. Not about that. I talked to him about coming to Albuquerque and meeting him there.

Q. You made an appointment with him over the telephone?

A. I believe so, yes, sir.

Q. And did you go to Albuquerque and have a discussion [171] with him? A. I did, sir.

Q. And can you tell us when that was?

A. December 23rd.

Q. Where did you first see Liberman, Mr. Liberman on that day? A. In his office.

(Testimony of Robert T. Jenkins.)

Q. And who was there other than you two?

A. To the best of my recollection, no one.

Q. Did you have a conversation with him regarding the option of the Nagel Company?

A. Yes, sir.

Q. Tell us what was said?

A. I told him that I wanted to get a copy of his deal with the Gallagher interests, that we wanted to look at it, see whether we wanted to exercise our option.

Q. What did he say?

A. His reply was, well, that we ought to go down to Judge Johnson's office.

Q. Judge Johnson was his Albuquerque attorney? And your response? Tell us the whole conversation, Bob.

A. I told him that I wasn't over there to talk to attorneys, that I was over there to get the deal and that we didn't have our attorney, I didn't have our attorney with us; and his reply was, "Well, let's go down there and talk to him. [172] If you want to get your attorney, you can get him," something to this effect. And I said, well, I'd go down there but if we discussed the thing in any serious vein about whether or not we had a right or whether or not we had an option or any legal matter, why, I was going to call an attorney.

Q. Did he comply with your requests that day to allow you to see the agreement he had made for the purchase?

A. He did not. [173]

(Testimony of Robert T. Jenkins.)

Q. Did he refuse to answer? A. Yes, sir.

Q. Did you go to Judge Johnson's office then?

A. Yes, sir.

Q. You and Liberman met there or went there together, did you?

A. Yes, sir. Well, I think I went over in his car with him.

Q. With him? A. Yes, sir.

Q. Did you meet and talk with Judge Johnson in his office? A. Yes, sir.

Q. Anyone else present? A. No, sir.

Q. And that was on the day of December 23rd, 1958? A. Yes, sir, I believe so.

Q. Can you tell us the conversation at that time?

A. Well, I restated my mission.

Q. Which was simply what?

A. Which was simply to get a copy of the contract and take it to Winslow so that we could study it and decide whether or not we wanted to exercise our option.

Q. And you told him that?

A. In just about that many words, yes, sir. [174]

Q. And what did Liberman say?

A. Well, I don't recall that Mr. Liberman said anything, had any response to that. I think Judge Johnson made a response to it.

Q. Did they comply with your request, either of them? A. They did not.

Q. For a copy or to allow you to see a copy?

A. No, sir, they definitely refused to let me have it, stating that Maurice Liberman had no obliga-

(Testimony of Robert T. Jenkins.)

tion, and this was a different deal, and that he felt he had been released, no moral obligation at all.

Mr. Moore: May we interrupt, I didn't want to object, Mr. Romley, but I want the witness to clarify who made that statement.

Q. (By Mr. Romley): Tell us, Mr. Jenkins, as best you recall who made that statement.

A. Well, the total statement was probably made by both Judge Johnson and Mr. Liberman. I think Judge Johnson said that there was some question in Liberman or the Liberman group's mind as to whether or not we had a right, and that they didn't feel at this time that they had an obligation to us. And I think then that Maurice Liberman said that this was a different deal. I believe this is correct. I might be in error on who said those two things though.

Q. Did Mr. Liberman say anything more by way of [175] explanation for refusing to allow you to see the contract? A. Yes, sir.

Q. What did he say?

A. He said that he had talked to Mrs. Nagel on the telephone.

Q. Anything more than that?

A. Not that I can recall, sir.

Q. Fine. Then you went without the contract back to Winslow? A. Yes, sir.

Q. Did you talk with Mrs. Nagel about your visit? A. Yes, sir.

Q. Did you talk to your attorney about your visit? A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. At that time and for several years Mr. James J. Cox, Jr., had been your attorney?

A. Yes, sir.

Q. Or the company's attorney, is that right?

A. Yes, sir.

Q. Did you have a later conference with Liberman and Judge Johnson? A. Yes, sir.

Q. Approximately on what date, if you recall, sir?

A. I believe it was still in December. I'm—let me see. No, no, it was in January. [176]

Q. Early, middle or late January, what do you remember? A. Early January.

Q. Early January? A. Yes, sir.

Q. Where did that conversation take place?

A. In Judge Johnson's office.

Q. In Albuquerque? A. Yes, sir.

Q. Who was present?

A. Judge Johnson, Mr. Liberman, Jim Cox, Mrs. Nagel and myself, I believe.

Q. Just the five of you?

A. I think there was another girl in the office, I think Judge Johnson's people were there but nobody was sitting in the conference with us.

Q. I see. You mean inside the conference room there were just the five of you?

A. Inside his office, that's right, I believe.

Q. Now tell us what was said by the parties there and the attorneys during that conference.

(Testimony of Robert T. Jenkins.)

A. During the interim period Mr. Cox, our attorney, had gotten a hold of Judge Johnson and talked to him about us seeing the contract. And some way they had agreed to let us see the contract. And that was our purpose for being over there was to look at the contract. When we walked in as I [177] recall after salutations we got the contract and went out to read it.

Q. Where did you go?

A. We went into the library at Judge Johnson's office.

Q. The three of you, you, Mrs. Nagel and Jim Cox?

A. Yes, sir.

Q. And what transpired there, did you read the contract?

A. Well, we glanced through it briefly. Of course we didn't have sufficient time to read it in any great detail. We got the general gist of the deal that had been made.

Q. Did you read it sufficiently to get the terms, the sale price, the manner of payment, et cetera?

A. Yes, sir.

Q. And did you and Mrs. Nagel reach any conclusion at that time as to what you wanted to do with regard to your operation?

A. Yes, sir.

Q. Then after reading in the manner you have indicated and reaching the conclusion you have said you reached, did you go back and talk with Judge Johnson and Mr. Liberman?

A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. The three of you went back into the office and again only the five of you present, is that right?

A. Yes, sir.

Q. Now tell us what transpired at that [178] time?

A. Mrs. Nagel, I believe the first thing she said, was, "Maurice, you have made a real good deal, and I congratulate you." She said—I don't recall the exact words she used, but she said words to the effect that we would exercise our option, "we want to exercise our option in this deal."

Q. And what was the response to that?

A. Well, the response was that we didn't have an option.

Q. Well, tell us who said that?

A. I believe Maurice said that.

Q. Well, did he just say it in so many words, "you don't have an option"? Just what did he say?

A. He said, "Mrs. Nagel, I have no moral obligation to you. This is all past, this is a different deal altogether than what we were talking about in an option." And he said, "I feel—I have, I think no obligation at all to you." He said—I believe he said, "I thought that I was released and I think I was released in our telephone conversation," or something. I just—that may not have been said at this meeting.

Q. You are not sure whether it was, it may have been or may not have been?

A. It may have been, yes, sir.

(Testimony of Robert T. Jenkins.)

Q. But you do remember his saying, "Mrs. Nagel, I have no moral obligation, this is a different deal." That much you [179] do recall?

A. Yes, sir.

Q. Do you remember anything more in that conversation?

A. Yes, sir.

Q. Tell us what it was.

A. Mrs. Nagel said, "Well, what do you mean you have no obligation? We have our agreement." And I'm sure that's when Maurice said, "I feel that I have been released in our telephone conversations." And in fact the discourse was rather heated at this particular point. And if I remember correctly, either Judge Johnson or Mr. Cox then took up parts of the conversations.

Q. Up to that day, Bob, did you know what the terms of the sale were, the amount to be paid and how it was to be paid?

A. Mrs. Nagel had told me what Mr. Liberman had told her the terms were over the telephone.

Q. And what was said to you in that regard?

A. That Mr. Liberman had told her he was going to have to pay \$650,000 cash for the mill.

Q. That he told her that over the telephone?

A. That's what she told me, yes, sir, and that the timber was \$17.

Q. Now when you read the agreement which is in evidence here, did it provide for the payment of \$650,000 in cash? [180]

A. Not in one payment, no, sir.

(Testimony of Robert T. Jenkins.)

Q. It provides for a payment over a period of five years, \$10,833.33 per month, I think?

A. As I recall it, yes, sir.

Q. With nothing down on that payment, the first payment to start at the time——

Mr. Moore: We object to that, the contract is in evidence, it speaks for itself.

-Mr. Romley: That's correct, I concede it. I withdraw that.

Q. (By Mr. Romley): Up until that day, and I'm speaking of early January, 1959, did you know that the purchase had been made on a credit basis as distinguished from a cash basis?

A. No, sir, I can't say that I did.

Q. Did you talk or have any further conversation with either Liberman or Judge Johnson after that January meeting and before this lawsuit was filed?

A. Yes, sir.

Q. When was that?

A. I don't recall the exact date, it was either in February or March.

Q. And where was that?

A. In Judge Johnson's office in Albuquerque.

Q. Who was present? [181]

A. Myself, Maurice Liberman, James Cox, Judge Johnson and Joe Grevey.

Q. He is one of the Duke City partners and a brother of Maurice Liberman?

A. Yes, sir, as I recall that was all that was at the meeting.

(Testimony of Robert T. Jenkins.)

Q. Now what was the occasion of your being in Judge Johnson's office at that time?

A. To specifically state that we wanted to exercise our option, and that—

Q. Were you still desirous of proceeding with the acquisition of the half interest?

A. Most definitely, yes, sir. Either exercising it or settling the matter, one or the other. We would have been receptive to either one.

Q. And was that the subject of your discussion then? A. Basically, yes, sir.

Q. No agreement of any kind was reached in that conference with regard to allowing you to come into this deal except that you couldn't do it?

A. We couldn't do it, that's right.

Q. It's been called to my attention I have overlooked a couple of things. First I'd like to ask you about a conversation that Mrs. Nagel testified about this morning. I believe her testimony is that early that morning at about [182] 8:00 o'clock of October 16th, 1958, she called you in Phoenix. Do you recall that? A. Yes, sir.

Q. Where were you staying in Phoenix?

A. I believe I was at the Adams Hotel with my wife.

Q. Were you here on business or—in Phoenix on a business or pleasure trip?

A. I think it was a combination.

Q. Did she reach you at the Adams Hotel?

(Testimony of Robert T. Jenkins.)

Q. Who is that, sir?

Q. Mrs. Nagel when she called?

A. No, sir.

Q. Where were you and where did she—where you when she did contact you and talk with you?

A. I was in Mr. Cox's office in the Title Building.

Q. Do you know about what time that was, Bob?

A. Yes, sir.

Q. Can you tell us, please?

A. Around 8:00 o'clock.

Q. In the morning? A. Yes, sir.

Q. Do you know the reason for that call from Mrs. Nagel to you?

A. I know what she told me, yes, sir.

Q. Tell us what that was. [183]

A. She said that she had received a call from Maurice that morning, and that he wanted her to release him from the option that we had signed with him.

Q. And tell us the entire conversation.

A. She asked me what I thought about it and I said, "Well, I haven't had a chance to—this is cold." And, "Is that all he wanted?" And I'm sure she said, "That's it," or words to this effect. And I said, "Well, let me talk it over with Jim here." He was sitting right across from me. "And I will call you right back and tell you how we feel about it."

(Testimony of Robert T. Jenkins.)

Q. Did you talk to Jim?

A. I hung up the phone and discussed it with Jim Cox for maybe ten minutes.

Q. Did you call—— A. Fifteen minutes.

Q. Did you call Mrs. Nagel back?

A. I did, yes, sir.

Q. Did you tell her what conclusion you had reached? A. I can't hear you, sir.

Q. Did you tell her what conclusion you had reached, what you had decided for yourself?

A. Yes, sir, I told her that Jim and I couldn't see any reason that we should give up our option, that we had until April the 30th if we wanted to make a deal to go ahead, and [184] we couldn't see any reason for his even asking it of us.

Q. And was any understanding reached as to what she would do then?

A. Yes, sir, she said that he had asked her to send him a wire and that she would—she was going to go ahead and send it, and she would tell him that we wasn't going to release him from the option.

Q. And that was your wish and hers too, I assume, is that right? A. My word?

Q. That was your wish and hers?

A. Yes, sir.

Q. Now on another subject that I didn't cover sufficiently awhile ago, you told us about a position in the forest, and what it means. With regard to that particular subject does position in the forest

(Testimony of Robert T. Jenkins.)

have any increasing value to the Nagel Company by reason of any facts or circumstances that exist, and please just answer that yes or no.

A. Would you read that?

Q. Maybe I didn't make it too clear.

(Whereupon, the pending question was read by the reporter.)

Mr. Moore: Your Honor, I can't understand that question.

Mr. Romley: Well, maybe I don't either, I will try [185] and restate it.

Q. (By Mr. Romley): You have defined in a way position in the forest, Bob, try to here. Does it have any meaning and value to a lumber mill?

A. Yes, sir.

Q. What is that?

A. It has a tremendous value because the plant is worthless without it, without a position in the forest with which the timber can be obtained.

Q. Without timber the plant can't operate, is that right? A. Right, yes, sir.

Q. In September, 1958, the Nagel Company had some timber cutting rights under the Aztec contract, is that right, sir?

A. What year, what date?

Q. In September, 1958. A. Yes, sir.

Q. Do you know with whom that contract for Aztec timber had been entered? A. Yes, sir.

Q. Who was that?

A. It was — Nagel's contract you are speaking of?

(Testimony of Robert T. Jenkins.)

Q. Yes.

A. Was entered with Southwest Lumber Mills in Phoenix.

Q. Was there an amount that was specified to be cut by Aztec timber? [186]

A. Yes, sir.

Q. How much was that?

Mr. Moore: We object to that, your Honor. I don't see the materiality of the requirement of cutting Nagel's contract with Southwest Lumber Mills.

The Court: I don't see the materiality of it, Mr. Romley.

Q. (By Mr. Romley): Do you know whether Gallagher had a contract with the Nagels—with the Southwest Cotton Company for the cutting of Aztec wood?

A. The Gallagher interests did, yes.

Mr. Moore: You said the cotton company, are we out of the lumber business now? You said Southwest Cotton Company.

Mr. Romley: There used to be a company by that name. I'm sorry, it's getting late for me. Let me start over again, Bob.

Mr. Moore: Don't you have a copy of that document if there is such a contract? We can produce it and talk about what it is. You have got it.

Mr. Romley: Perhaps we can stipulate as to most of the facts.

Mr. Moore: I am not in a stipulating mood but you have a copy of the contract.

(Testimony of Robert T. Jenkins.)

The Court: Well, it's almost 4:30. [187]

At this time we will recess until 9:30 in the morning.

(Whereupon, a recess was taken from 4:30 p.m. on May 3rd, 1960, until 9:30 o'clock a.m. on May 4th, 1960.) [188]

May 4, 1960, 9:30 O'Clock A.M.

ROBERT T. JENKINS

resumes the witness stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Romley): Mr. Jenkins, of course you are familiar with the operation of the Nagel mill and have been for the past several years, is that right, sir? A. Yes, sir.

Q. It's physical location, the mill itself, joins the Duke City, former Gallagher mill in the town of Winslow?

A. The properties adjoin, yes, sir.

Q. Have you ever seen the Gallagher mill?

A. Many times, yes, sir.

Q. From the outside, or have you been clear through it?

A. I have been clear through it.

Q. Have you been clear through it a number of times? A. Many times, yes, sir.

(Testimony of Robert T. Jenkins.)

Q. Have you been through the Gallagher mill when it was operating, that is to say, sawing logs and manufacturing them into timber?

A. Yes, sir.

Q. Can you approximate the number of times that occurred? [189]

A. Many times.

Q. Have you been in the Gallagher mill since Duke City took it over?

A. Yes, sir.

Q. Can you approximate the number of times you have done that, sir?

A. Possibly two times.

Q. During those two times did you observe the manner of operation of the Duke City mill?

A. Yes, sir.

Q. And during the many times you saw the mill while it was still held by the Gallagher interests did you observe the manner of the operation of the Gallagher mill?

A. Yes, sir.

Q. Is the Duke City mill being operated in substantially the same manner as it was operated when Gallaghers owned it?

A. Yes, sir.

Q. Can you tell us if the operation of the Gallagher and Duke City mill differs in any material respect with the operation of the Nagel mill?

A. No, sir, it does not.

Q. Is it substantially the same?

A. Substantially the same, yes, sir.

Q. Insofar as the production of timber is concerned, production of lumber from timber I guess is more accurate, [190] will the two mills manufac-

(Testimony of Robert T. Jenkins.)

ture any different amount of timber or is it substantially the same quantity?

A. Substantially the same quantity.

Q. I believe you said—you may not have, but perhaps I had better ask you—what is the source of supply of timber to the Nagel mill?

A. The Chevalon working circle in the Sitgreaves National Forest and Aztec timber we had under contract with Southwest Lumber Mill.

Q. What is the source of supply for the old Gallagher, now Duke City mill?

A. The Sitgreaves National Forest and Aztec timber they have under contract.

Q. The same source of supply, is that right?

A. Yes, sir.

Q. Is the timber which is processed or manufactured into lumber in these two mills substantially the same timber? A. Yes, sir.

Q. Mr. Jenkins, do you have any opinion as to the number of years that timber from the Sitgreaves National Forest will be available for the two mills?

Mr. Moore: We object to that, if your Honor please. Foundation has not been laid, qualifications are not shown.

The Court: I don't believe sufficient foundation has been laid as to that, Mr. Romley. [191]

Q. (By Mr. Romley): Mr. Jenkins, have you made any investigation or inquiry in an attempt

(Testimony of Robert T. Jenkins.)

to ascertain whether or not timber will continue to be available for manufacture into lumber by these two mills, just yes or no, please? A. Yes.

Q. And have you made such an investigation to ascertain the amount of timber that will be available? A. Yes.

Q. I am not sure whether my first question encompassed for how long; if I didn't do that, does your investigation include that? A. Yes, sir.

Q. What have you done in that regard, Mr. Jenkins, without stating the quantity, but tell the Court what you have done in seeking to ascertain this information.

A. We have talked to all Forest Service officials we come in contact with normally in the course of our business, all the way through the Regional Office level.

Q. When you speak of the Regional Office level, tell us what you mean.

A. That is the managing office for the States of Arizona and New Mexico, all the Forest Service functions in those two states.

Q. Where is that office maintained?

A. In Albuquerque. [192]

Q. Are there any representatives of that office stationed or maintain headquarters in Navajo County where Winslow is located?

A. There are offices of this Region in Navajo County, yes.

Q. Where in Navajo? A. In Holbrook.

(Testimony of Robert T. Jenkins.)

Q. Has your investigation and inquiry been with the Regional Offices in Albuquerque and also in Holbrook? A. Yes, sir.

Q. Is your opinion based on anything more than what you have related here? In other words, is it based entirely on the inquiries and investigation you have made in connection with the Forest Service? A. No, sir.

Q. In your opinion, Mr. Jenkins, how long will timber be available as a minimum period?

Mr. Moore: We object to that, if your Honor please. It is very apparent the opinion is based upon hearsay. There are documents available and I believe there is a gentleman here under call from the Regional Office in Albuquerque of the Forest Service. This opinion is based entirely upon hearsay evidence.

Mr. Romley: I think that probably is correct, your Honor, we do have a gentleman available who will testify. [193]

The Court: Very well.

Q. (By Mr. Romley): Mr. Jenkins, in the course of your visits to the Gallagher-Duke City mill you told us you had gone through the mill itself, through the plant, is that right?

A. Yes, sir.

Q. Are you acquainted with the, and were you in September, 1958, the condition of the various component items of the mill?

(Testimony of Robert T. Jenkins.)

A. Yes, sir, fairly well so, not to the same degree as a person managing the plant would know, but it is a fair degree I was acquainted, yes, sir.

Q. Has your experience in the operation of the Nagel mill as assistant manager for the past several years been such as to enable you to learn and know the approximate life of various items of equipment you used in a sawmill? A. Yes, sir.

Mr. Romley: Perhaps, if your Honor please, it might be appropriate at this time if I can, with counsel's approval, read into the record for the purpose of further examination of this and other witnesses, the various items that Duke City received insofar as the mill itself is concerned from Gallagher, and the values allocated thereto by Duke City. This information was furnished me at my request by Mr. Moore on Sunday of this week. Do you have any objection?

Mr. Moore: Yes, I do. It is not material or admissible, if your Honor please, for any purpose. What Mr. [194] Romley asked me to furnish him was the depreciation schedule which had been set up, values allocated for the purpose of depreciation in connection with the bookkeeping. I did. I cannot see the relevancy of that in this case. There is no basis laid yet for any liability which would lead to such evidence if it should become pertinent or relevant evidence at a later date with respect to the issue of damages.

(Testimony of Robert T. Jenkins.)

The Court: Well, we have testimony, Mr. Moore, from this witness and the preceding witness that would, if credited, form the base for an agreement between these parties, contract between these parties. I believe the evidence is in such condition that the matter of damages may be entered into in the plaintiffs' case at this time.

Mr. Moore: Then I cannot see the materiality of this particular evidence in order to ascertain——

The Court: I don't know what is in it. I assume it is a list of equipment.

Mr. Moore: It is a list of equipment and value put on the books for bookkeeping purposes on the depreciation schedule.

The Court: I don't know as that would be helpful. Of course the witness might make assumptions on the basis of it if the list is accurate. But my problem is I don't know what is in it and what Mr. Romley, what part of it Mr. Romley wanted to use at this time. [195]

Mr. Romley: That is correct, your Honor. All I propose to read into the record are in connection with depreciation, because I think that is an element ultimately in ascertaining the amount of damages. The several items, for instance, sawmill, planing mill, shop, et cetera, all of which were furnished me by counsel for the defendants. And the various times allocated by the defendants themselves to these various items which aggregate the \$650,000 about which there has been testimony. I think it

(Testimony of Robert T. Jenkins.)

is perfectly proper that be in the record as a basis for further testimony by this witness and further exhibits to be later offered in evidence.

The Court: May I see it, please?

Mr. Romley: I am sorry, Rex, I don't have another copy with me. It is being typed now and will be ready before noon. Those typed below the line, your Honor, were not figures given me by Mr. Moore, but my own computations; those above the line were figures given me by Mr. Moore. I will be happy for him to see it before I examine this witness further or read this matter into the [196] record.

Mr. Romley: I might say the headings across the top indicate the percentage of salvage value as furnished me by Mr. Moore.

The Court: Well, I will say frankly it doesn't mean anything to me in its present form. I wouldn't know what the purport of the sheet was.

Mr. Romley: Well, I appreciate that, your Honor, and that was one reason I felt we should go into it further.

If it is proper at this time, your Honor, I would like to ask if Mr. Moore will stipulate that at my request he told me that one of the items acquired by Duke City from Gallagher was an item designated on Duke City's books as a saw mill, and that it appears on Duke City's books for purposes of depreciation at a figure of \$176,970, and that Duke

(Testimony of Robert T. Jenkins.)

City's records indicate that that saw mill would have a 15 percent salvage value after the period they showed for its depreciation.

Can you so stipulate, Mr. Moore?

Mr. Moore: Your Honor, I don't mind stipulating as to what I told Mr. Romley, but I do object to this evidence at this time, it's not material or relevant to any issue in the case. He asked me to ascertain, to save time in the courtroom, of how the depreciation schedule was set up from their books.

Whether it's relevant I felt that I was obliged to give him that information and I did give him that information. But [197] I don't think it is admissible on any theory, I don't know what theory of damage Mr. Romley has in mind that that evidence would be relevant to. And as far as understanding and explaining it, I am not an accountant or a bookkeeper, certainly I will stipulate I told Mr. Romley that and he wrote it down. But what it means in bookkeeping and accounting is something I am not familiar with.

The Court: Well, unless you have the life, the depreciable life I still don't think you have anything, and I don't see it on there. My understanding of Mr. Romley's purpose, Mr. Moore, is that he feels that his evidence has and probably will establish—I'm not saying that it has—an agreement between these parties whereby the plaintiffs acquired an option which they exercised to get a one-half interest in this mill and the timber that

(Testimony of Robert T. Jenkins.)

was purchased by Duke City from the Gallaghers; that in the agreement further they were to buy it and they were to operate it together; that that was their understanding and agreement, and this testimony is directed to showing how long it would have lasted, what was there, how long it would have lasted, what salvage values there would be when they were through operating it, and all of it going to the matter of damages.

Now, it's not a simple picture, but if there be a contract established and the nature for which the plaintiffs contend, then we probably have got a very broad picture of [198] damages and I couldn't draw the line too narrowly at this time.

Mr. Moore: Well, I have this position in mind at this time, your Honor: That I'm sure that counsel has in mind ultimately or at least hoping to ultimately establish the basis that your Honor mentioned, option to purchase a part of the property and operate.

Up to this time there is no evidence, no credible evidence in this record of any understanding with reference to operation or any agreement with reference to operation. That's the reason I say it's certainly not relevant at this time.

Now, if they establish all that and the damages are established as a clear fact, or that the occurrence of damages is clearly established as a breach of the agreement that the Court says Mr. Romley anticipates showing, then I agree that under the

(Testimony of Robert T. Jenkins.)

law there is a broad field to go into. But until the basis is laid, then I object to any evidence on the issue of damages other than the value of the property as of the date it was acquired.

The Court: Well, I think that we are far enough with the claim of the contract that we could put the witness off and let you cross examine him about this thing, and then take more testimony and then get into the damages separately.

But if we were going to do that I would have granted [199] the suggestion you made that we try the issue of liability first and then the matter of damages. I think it will expedite matters.

I still don't think that is going to help me any, this exhibit that counsel, or the sheet that counsel has because I don't understand it. But I think at this time we will, subject to the items being properly identified and properly established, I will hear evidence on the matter of damages in the interest of expediting the trial.

Mr. Romley: Well, then, if the Court pleases, may I inquire of counsel if he will stipulate to the effect I just stated without waiving his position that damages are not recoverable but only stating as a fact those things that I related? Perhaps I'd better state it over again.

Mr. Moore: I said to Mr. Romley I will stipulate that I gave you that information. Now, what you have on that sheet I know nothing about, and if you want me to stipulate to something with ref-

(Testimony of Robert T. Jenkins.)

erence to records or books I would prefer to have the opportunity to consult with some of our people who know what the books are; I don't.

Mr. Romley: Well, I can go into it later. I feel that these are figures that you did give me and you have the memorandum of what you gave me the other day?

Mr. Moore: No, I don't.

Mr. Romley: Well, then, I can appreciate your position [200] in being unable to agree with me. But I do have——

Mr. Moore: I remember that I read the figures to you and you wrote them down and read them back and it looked like you recorded them accurately.

Mr. Romley: If your Honor will excuse me while we address one another directly, but we are trying to see if we can expedite the matter.

The Court: I suggest in view of the situation counsel are in that we pass this and see if you can get together a little later.

Mr. Romley: Very well, your Honor. If the Court pleases, we'd like at this time to announce that I have concluded my direct except on this issue that we were just discussing and the natural follow-up on that, which I can take after counsel has an opportunity to confer with his accountant who is here, and after he has carried on his cross examination on the matters.

The Court: Very well. With that understanding, Mr. Moore may cross examine and you may recall

(Testimony of Robert T. Jenkins.)

the witness after you have conferred with Mr. Moore.

Mr. Romley: Thank you, your Honor.

Cross Examination

Q. (By Mr. Moore): Mr. Jenkins, as I understood your answer to Mr. Romley [201] yesterday, sometime prior to September 23rd, 1958, you were in Las Vegas and then San Francisco with Mr. Gallagher, is that correct? A. Yes, sir.

Q. That was the week before September 23rd, was it, approximately a week before or was it longer than that?

A. No, sir, it was approximately a week before.

Q. And that in your discussion with Mr. Gallagher with respect to the offer which he had made to the Nagel Company you had assured Mr. Gallagher you'd get in touch with him the following week and advise him whether or not you were interested in exercising your right to purchase under the offer he had made. That's true, isn't it?

A. Yes, sir.

Q. And that was, of course, prior to September 23rd? A. Yes, sir.

Q. And prior to September 20th, of course?

A. Yes, sir.

Q. So that before Mr. Liberman met with you in Winslow on the 20th you had already made an arrangement with Mr. Gallagher whereby you were

(Testimony of Robert T. Jenkins.)

to contact him in person or by telephone or some manner the week of September 23rd and give him some report on whether or not you were interested in purchasing the mill at Winslow under the offer Gallagher had made?

Mr. Romley: Just a moment, I object to the form of the [202] question if your Honor pleases, it assumes a fact not in evidence and states it as if it were, "and so you told him you were going to be there the week of the 23rd of September." That is not the evidence.

The Court: Well, the witness may answer whether he did or didn't. Read the question to him.

(Whereupon, the pending question was read by the reporter.)

A. Mr. Moore, I think that you may have misread what I intended.

Q. (By Mr. Moore): No, just answer that question, please, Mr. Jenkins.

A. Well, I'd have to answer it no.

Q. Well, then, let's back up. Had you not told Mr. Gallagher sometime the week before September 20th that within a week you would give him some reply or report as to whether Nagels were interested in buying the mill in accordance with Gallagher's offer?

A. He knew we were interested.

Q. No, answer the question, please. You told Mr. Gallagher either in San Francisco or Las Vegas that you would let him know in a week, didn't you?

(Testimony of Robert T. Jenkins.)

Mr. Romley: Now, just a moment, I object to the form of the question. Let him know what in a week?

Mr. Moore: Well, I'm trying to break it down so I can [203] get a—

Mr. Romley: I object to the form.

A. I told him I'd be in contact with him in a week or so.

Q. (By Mr. Moore): Or so?

A. Or so, yes, sir.

Q. And what were you to be in contact with him about?

A. I would advise him whether or not we would exercise our right of first refusal and say yes or no at that time.

Q. And you had advised Mr. Gallagher of that before you met with Mr. Liberman, hadn't you?

A. Yes, sir.

Q. In this meeting on September 20th when it broke up I believe you told Mr. Romley that your understanding was that Mr. Liberman and you would write up some sort of an agreement to commemorate the fact we had reached an agreement?

A. That's my exact words; yes, sir.

Q. And you were to do that in Albuquerque on the 23rd? A. No, sir.

Q. When were you to do it?

A. When I went to Albuquerque to see Mr. Gallagher.

(Testimony of Robert T. Jenkins.)

Q. Well, what date was that?

A. That ultimately was the 23rd.

Q. And you did go over on the 23rd?

A. I did, yes, sir.

Q. And you did read over the letter agreement which Mr. Liberman [204] had prepared and handed to you? A. I did, yes, sir.

Q. And you submitted it to your comptroller, Mr. Nelson, for his review? A. Yes, sir.

Q. And then you signed it? A. Yes, sir.

Q. And you had authority from the Nagel Company to sign for Nagel, didn't you?

A. Yes, sir.

Q. In this discussion on April 20th, when some mention was made of the fact that Nagels' money might be tied up in inventory, did Mr. Liberman offer to assist the Nagels in procuring financing if they needed it and wanted to go in this deal with him?

A. Not that I can recall, no, sir.

Q. You don't recall him saying that?

A. No, sir.

Q. On September 20th when you met were you then able to finance—Nagel Company, I mean—the purchase of a half of this mill and ultimately the timber?

A. I really can't say whether we were or not unless I would look at the record, Mr. Moore.

Q. Were you able at that time to purchase the entire mill under the offer which Mr. Gallagher had made you? [205]

(Testimony of Robert T. Jenkins.)

Mr. Romley: For the record, if your Honor pleases, we object on the grounds that that is entirely immaterial in view of the fact that there was a consideration given for the Nagels not continuing further in connection with their right of first refusal. The exhibit in evidence here—I don't recall its number—the letter of September 12th, 1958, Mr. Liberman signed acknowledges that Gallagher told him that they had the right of first refusal and he went to them and asked them to give up their right of first refusal in consideration of which he would allow them to participate in the purchase on a fifty-fifty basis, or give them an option so to do.

This other is entirely immaterial. Your Honor may wish to hear it, but I feel for the record I should state my objection.

The Court: It's cross examination and it may be foundational for something else. I will hear it on that basis.

A. Could I have the question?

(Whereupon, the pending question was read by the reporter.)

A. If I give a yes or no answer, Mr. Moore, it's on the basis of an assumption. I would answer it yes, I think we would have been able to. But I would have to check the record to be completely sure. [206]

Q. You did not have a commitment from the bank at that time to lend the necessary funds to consummate the purchase, did you?

(Testimony of Robert T. Jenkins.)

A. We had a commitment from no one to that effect.

Q. You had not submitted any written projections or computations with reference to the operation to the bank at that time, had you?

A. I think we had not, no, sir.

Q. So that I may be clear, Mr. Jenkins, it was Mrs. Nagel who talked to Mr. McKinney, the banker, about this matter, wasn't it?

A. That is correct, yes, sir.

Q. And was that conference and conversation held in your presence or——

A. No, sir, it was not.

Q. Now, Mr. Jenkins, if, as you answered, you think that you could have bought the entire plant and timber, why was it that you would need time to buy only half of it?

A. I assume that the purchase and negotiations—I say “I,” I mean the Nagel Company, Mrs. Nagel and I—would last into the middle of the winter and if we were to buy a half interest we weren't going to have to make bank commitments and try to get the money up so that we could handle our half of the consummation of the purchase price waiting until April 30th and getting our own funds. [207]

Q. What caused you to assume that the negotiations would last up into the winter?

A. I'm sure, Mr. Moore, that you realize that I wouldn't think you could conclude and consum-

(Testimony of Robert T. Jenkins.)

mate a purchase like this in a matter of two weeks or so.

Q. Were there any facts upon which you base that assumption?

A. Just the experience I have had in making deals of this particular nature and watching deals like this be consummated.

Q. Was it because of the fact of negotiations that you had had with Mr. Gallagher?

A. Not necessarily so, no, sir.

Q. Was it because of the fact that you had knowledge that Mr. Gallagher was offering the mill to other people?

A. No, sir, definitely not.

Q. You did know he had offered it to Whitings?

A. At that time I did not.

Q. When did you first learn that?

A. I think at the Southwest Pine Association meeting in Pinetown.

Q. And what date was that approximately?

A. I think it was sometime in October.

Q. Did you learn that Mr. Gallagher had made an offer of this mill to Mr. Coach of the Kaibab Lumber Company, which [208] I had in mind when I said Whitings—I used the term Whitings rather loosely—prior to your meeting with Mr. Liberman on the 20th?

A. No, sir.

Q. Did you learn when the offer was made to Whiting or Kaibab Lumber Company?

Q. Did I learn when, sir?

Q. Yes. A. At that time, no, sir.

(Testimony of Robert T. Jenkins.)

Q. You didn't know when the offer had been made? A. No, sir.

Q. But you did learn on September 20th that Mr. Gallagher had offered the mill for sale to Mr. Liberman prior to the 20th?

A. No, sir, I understood from the April 20th meeting that Mr. Liberman would like to buy the mill and he specifically stated that he was second in line, he was the one that was going to negotiate with it.

Q. I say though you learned, Mr. Liberman told you on the 20th that Gallagher had made him an offer at the same price that he had offered it to you, didn't he?

A. Yes, sir; yes, sir.

Q. So that day you knew that Gallagher had offered it to Mr. Liberman?

A. Subject to our first refusal, yes, sir. [209]

Q. Did you see the written proposal that day that Mr. Gallagher had prepared and Mr. Liberman had signed with which he had deposited his check for \$10,000?

A. No, sir, I did not. Did you say did I or had I?

Q. Did you? A. No, sir, I did not.

Q. Or had you seen it prior to that time?

A. No, sir, I had not.

Q. Now, as I understood your answers yesterday, Mr. Jenkins, the only discussion about management of this plant, and I'm referring to the

(Testimony of Robert T. Jenkins.)

September 20th meeting, was some inquiry as to whether Mr. Liberman would be agreeable to your managing it, is that correct?

A. Yes, sir.

Q. You did not reach an agreement with respect to your management if it was purchased and the option exercised, did you?

A. Mr. Liberman agreed with us that he would be acceptable to my managing the plant.

Q. Did you have any discussion as to what arrangement would be worked out with reference to your management of the plant?

A. By arrangements, you mean what, sir?

Q. Salary? A. No, sir. [210]

Q. Time that you would spend there?

A. No, sir.

Q. What part of the work you would actually do?

A. I think that we discussed it in terms of manage the production, I'm not sure of that. But I seem to recall that to some degree.

Q. Well, you did not reach a concrete, hard and fast type of an agreement on that management, did you?

Mr. Romley: Object to the form of the question, if your Honor please, it's too vague.

Mr. Moore: Well, I'm using language out of the deposition, Mr. Romley, to which I will refer.

Mr. Romley: It still is objectionable.

The Court: The objection is sustained.

(Testimony of Robert T. Jenkins.)

Q. (By Mr. Moore): Did you actually have an agreement with Mr. Liberman that if this mill were bought and you both participated in it or exercised an option in it or were in it that you would manage the operation of the mill at Winslow? [211]

A. The way you termed it, I would have to answer that is right. We did not have an absolute agreement.

Q. In fact, you hadn't discussed, as you say, salary or earnings or what part of your time would be devoted to it, or who would direct the policy and what your job as manager would encompass in those regards, you hadn't discussed any of those things, had you?

A. Well, Mr. Moore, we might have discussed policy and who would represent Duke City and what part I would be expected to manage, but the main agreement concerning the management was that Mr. Liberman would be receptive to my managing the plant for the two groups.

Q. That he would be receptive to it?

A. He would be receptive of my management of the two groups, yes, sir.

Q. You testified yesterday, Mr. Jenkins, to the effect that you were not interested in the actual physical plant of the mill because you had a mill and you were negotiating with Gallagher for position in the forest. Now these negotiations you had with Mr. Gallagher, were they solely upon the proposition that you were looking for position in the forest rather than the physical plant?

(Testimony of Robert T. Jenkins.)

A. I think one would go with the other, as far as Mr. Gallagher was concerned and our negotiations were for the two as a unit. Mr. Gallagher would not have given up his [212] position in the forest and left holding a mill that was no value to him.

Q. The thing you were interested in was position, is that right?

A. Well, yes, sir, but we would have had to have had the mill to process a certain portion of the timber that was acquired under this position arrangement.

Q. You would have to operate both mills, is that what you mean?

A. Possible one on a part-time or single shift basis and the other on a complete or two shift basis.

Q. You considered the \$500,000 offer that Mr. Gallagher made on the mill as a reasonable price for the mill, considering its position? Did you consider the \$500,000 price Gallagher made to you for the mill as a reasonable price for the mill, considering its position with the forest?

A. For the mill and its position, yes, sir.

Q. Do I understand by your answer, Mr. Jenkins, that the \$500.00 figure represented in your opinion the reasonable value of the mill, considering the physical plant and its location in the forest, in August, 1958?

(Testimony of Robert T. Jenkins.)

Mr. Romley: You mean 500,000?

Mr. Moore: 500,000. I don't know what I said.

Mr. Romley: You said 500.

A. Yes, sir, for its plant and its right or the right [213] or the right required to bid on the timber that would normally go through it.

Q. The \$500,000 figure was a reasonable price for it at that time, August, 1958?

A. Yes, sir.

Q. But you didn't buy it? A. No, sir.

Q. Was there anything about the physical plant or its position that would have increased the reasonable price of it from August to October, 1958?

A. May I have the question read again, please, sir?

(The last question was read.)

A. Mr. Moore, I think the reasonable price of the mill would have been more than \$500,000 even in August.

Q. (By Mr. Moore): How much more?

A. We never made a complete appraisal of the property, how much it was worth to us, so I can't say.

Q. Did I understand you a moment ago — I thought I understood you clearly, as of August, 1958, \$500,000 was a reasonable price or reasonable value for the mill, considering its physical condition, equipment and position?

A. Yes, sir, it was a reasonable price. \$200,000 would have been a reasonable price also or pos-

(Testimony of Robert T. Jenkins.)

sibly \$800,000. We never made a complete appraisal as to actually what it would have been worth to us. [214]

Q. How do you vary 200 to 800,000?

A. I used those figures just as illustration.

Q. From what you knew about it, Mr. Jenkins, you had been through the mill many times, hadn't you?

A. Yes, sir.

Q. You had seen it in operation many times?

A. Yes, sir.

Q. You knew its location? A. Yes, sir.

Q. You knew its location with respect to its proximity to the forest? A. Yes, sir.

Q. You knew the road conditions to the forest?

A. Yes, sir.

Q. And you knew what roads were in existence?

A. Yes, sir.

Q. And you knew something about the supply of timber? A. Yes, sir.

Q. And you knew what equipment was in the mill?

A. In broad terms, yes, sir. I don't know the make and model of some items, but yes, sir.

Q. As far as position is concerned, you knew all at that time about it that you know now about it, don't you?

A. As far as position is concerned, yes, sir.

Q. Now, with that knowledge was \$500,000 a reasonable [215] value for that mill in August, 1958, considering its position in the forest?

(Testimony of Robert T. Jenkins.)

A. Yes, sir.

Q. Did you know of any changes or additions in the mill itself, physical mill, or any changes with respect to its location and position which would have increased the reasonable value over \$500,000 from August to October, 1958?

A. I knew of no such changes, no, sir.

Q. Do you recall a telephone conversation that you had with Mr. Liberman on October 10, 1958?

A. I recall a conversation that I had with Mr. Liberman sometime in that area, yes, sir, I don't know the exact date.

Q. Let me ask you, instead of my assuming it. Have you read a transcript of the deposition of Mrs. Bishop which Mr. Romley took in Albuquerque sometime back and the transcript of that telephone conversation which she identified?

A. I have not read the transcript of her testimony. I was present when it was taken, when the deposition was taken and I have read a copy of the transcript she made.

Q. As she transcribed the telephone conversation? A. Has she—

Q. No, the transcript you read, was that the transcript she made of the telephone conversation?

A. A transcript of the telephone conversation, whether it is complete or not, I don't know. [216]

Q. The part that is in that transcript, was it correct?

(Testimony of Robert T. Jenkins.)

A. To the extent of my memory and knowledge, yes, sir.

Mr. Moore: Let the record show, Mr. Romley, that I asked the Court to hand me Mrs. Bishop's original deposition, it has not been unsealed.

Mr. Romley: If you have a copy of the deposition I have no objection to the use of the copy.

Mr. Moore: I wanted to check and see if this is a correct copy of what was affixed to the deposition.

Mr. Romley: All right.

Mr. Moore: I feel the witness should have a chance to look at this and look at that to see if this purports to be a correct copy.

(Deposition opened by the Clerk.)

Mr. Moore: I don't see the exhibit attached to it, Mr. Romley. Do you have a copy of the one furnished over there?

Mr. Romley: We have a copy.

(Defendants' Exhibit C marked for identification.)

Mr. Romley: If your Honor please, on counsel's statement this is a copy of the one about which Mrs. Bishop testified, we have no objection to his using this in lieu of the one which should have been attached.

The Court: Very well.

Q. (By Mr. Moore): Mr. Jenkins, I hand you Defendants' [217] Exhibit C marked for identification. Will you look at that, please, and see if that appears to you to be a correct transcript of the

(Testimony of Robert T. Jenkins.)

telephone conversation which you had with Mr. Liberman on October 10, 1958. It will take a moment to read that, if the Court please. I think he should be allowed to read it, out of fairness.

Mr. Romley: He doesn't say it is complete, that is his testimony.

Mr. Moore: I don't know whether he said this copy is correct, because this is a copy.

Q. (By Mr. Moore): After reading that exhibit, Mr. Jenkins, does it appear to be a correct transcript of the telephone conversation recorded there?

A. It appears to be a correct transcript of about what was said, Mr. Moore. There may have been some things added or left out I don't recall.

Mr. Moore: We offer Defendants' Exhibit C for identification in evidence.

Mr. Romley: We have no objection.

The Court: It may be received.

(Defendants' Exhibit C marked in evidence.)

Q. (By Mr. Moore): What was the capacity or what total number of feet of lumber were you running through the Nagel mill in August, 1958, in that area, in that period of time? You didn't hear me? [218]

A. I heard you, yes, sir, but I don't understand your question. What was the number of feet that went through the Nagel mill?

Q. Per year? A. Per year?

Q. What were you cutting per year?

A. In round figures 22 to 24 million feet.

(Testimony of Robert T. Jenkins.)

Q. Was that on a two shift basis, two shifts per day?
A. Yes, sir.

Q. Eight hour shifts, or longer?

A. Eight hour shifts.

Q. And on a two shift basis, approximately twenty-two million feet per year, was that the capacity of the mill?

A. On a two shift basis, yes, sir, twenty-two million feet a year was the capacity.

Q. How much Aztec timber did Nagel Timber Company have in which they owned the cutting rights?
A. In——

Q. '58.

A. In August, 1958. I would have to rely on memory and approximate.

Q. Approximately?

A. I think it was somewhere around fifty-five million feet of Aztec timber under contract.

Q. And how much Government timber or Forest Service [219] timber did Nagel have under contract or cutting rights on at that time in August, 1958?

A. Somewhere in the vicinity of twenty to twenty-five million, Mr. Moore, I believe that figure is right. I am relying strictly on memory.

Q. At that time and for the next two or three or four years thereafter you did not need additional timber to maintain the level of production which you were handling in August, 1958, did you?

A. We had sufficient timber under contract to operate for a period of about four years, yes, sir. Let me make a correction there. I think I am talk-

(Testimony of Robert T. Jenkins.)

ing in terms of twenty-two million feet lumber recovery to twenty-four million feet, in that range. Log scale, of course, is a different figure. That may have lasted five years that we had under contract.

Q. In other words, you then had under contract maybe enough to run full capacity two shifts for five years?

A. To run two shifts for five years, yes, sir.

Q. As of 1958 at least you did not need additional timber to sustain your level of operation?

A. For a period of five years, that is right.

Q. With reference to the seven year agreement letter we talked about, what was the discussion on September 20th about that seven year [220] agreement?

A. You want the complete discussion or the conclusion concerning the seven year agreement?

Q. The discussion.

A. The complete discussion. Mrs. Nagel told Mr. Liberman we wanted the position that we figured we were required to bid on the timber on the acquisition of this mill and that was what we were primarily interested in, and we needed it to sustain our level of operation after we had completed our Aztec cut. Mr. Liberman said well, he was only interested in operating in Winslow for about seven years and that at the end of that time his children would be either grown or close to getting up to the age where they would be not too much dependent upon him, and his brothers, he had little obligation

(Testimony of Robert T. Jenkins.)

to them, they were capable businessmen—I am putting this in because this is in general the way he explained it to us. He said, “at the end of seven years I will be ready to get out of business,” or indicated seven years was the length of time he wanted to operate in Winslow and at the end of that time he said, “I will sell you my remaining half interest in the plant.”

Q. Did he say how much he would ask for it?

A. He did not, no, sir.

Q. Did you discuss, you or Mrs. Nagel discuss a figure? A. Not a figure, no, sir.

Q. There was no price discussed at all? [221]

Q. Just some terms we would have to have it, if we could have it appraised in some manner so it would be fair to both of us.

Q. Did you discuss fixing the price by some manner of appraisal? A. Yes, sir.

Q. Did you discuss who the appraiser might be or should be? A. No, sir.

Q. Now, the letter that Mr. Liberman wrote to the Nagels on September 24th had a place at the bottom of it for signature by some representative of Nagels accepting that agreement?

A. Yes.

Q. Or consummating an agreement at that time, right? A. Yes.

Q. That was not signed by the Nagels, was it?

A. No, sir.

(Testimony of Robert T. Jenkins.)

Q. After September 23rd, do I understand you correctly, Mr. Jenkins, that your position is that Mr. Liberman was to buy the mill from Gallagher at Winslow and that you had the right, Nagels had the right to buy an undivided half interest in it under your 23rd agreement, 23rd letter?

A. Yes, sir, substantially that.

Q. You wanted to buy a half interest in it?

A. We wanted to buy the whole thing. [222]

Q. You wanted to buy all of it. But you did not feel you were able to buy all of it at that time?

A. Mr. Moore, Mrs. Nagel was talking with the bank. We hadn't I don't think definitely reached a conclusion that we were not or were able to buy it.

Q. You had a right, as you say, of first refusal up to September 20th, at least, or September 23rd when this letter was signed, insofar as the sale of the Gallagher mill was concerned?

Mr. Romley: Object to the form of the question, if you Honor please, it assumes he has testified up to that date when he has not fixed that date. He has said Tom Gallagher told him he would like to have an answer and that they would discuss it, he said in a week or so he would contact him, which time has not been fixed.

Q. (By Mr. Moore): Let me ask you this, Mr. Jenkins. As of September 23rd, before you executed and consummated this agreement, did you then have a right of first refusal insofar as the Gallagher mill was concerned? A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. And you say you gave that up in consideration of Mr. Liberman's agreement to buy the mill and sell you half of it?

A. Within thirty minutes after signing this contract we gave it up, yes, sir.

Q. You gave it up and you weren't interested any more in [223] buying it yourselves, because you had given up your right to buy it?

A. At that time, at the time we gave it up, that is correct.

Q. You of course wanted to buy it?

A. We wanted the whole plant, yes, sir.

Q. After you gave up the right of first refusal then you anticipated Mr. Liberman would buy the mill and you could buy half of it from him?

A. Immediately, and the balance of the other half in seven years, yes, sir. I say immediately, up to April 30th.

Q. As a matter of fact, Mr. Jenkins, on October 10th, 1958, in this telephone conversation, the transcript of which you read, you told Mr. Liberman you were thinking about buying it yourself, didn't you?

A. I don't know whether I told him in those exact words, I told him, I said we were thinking about getting back into the picture.

Q. And buying it, and asking if he had any objections to your doing that?

A. That is right, according to the transcript, yes, sir.

(Testimony of Robert T. Jenkins.)

Q. And he told you he had no objection to your doing it because, "we are with you"?

A. That is right.

Q. Now, I assume, Mr. Jenkins, that on September 23rd [224] when you went over to Albuquerque and you signed this agreement, that right then you desired very much to help Mr. Liberman acquire that mill from Mr. Gallagher, didn't you, if you could be of help to him?

A. I think that is a fair statement, yes, sir.

Q. You desired then to do everything you could do to aid in any negotiations that might occur between Mr. Liberman and Mr. Gallagher, didn't you?

A. We did absolutely nothing.

Q. I say you desired to help him because you had a right to buy half of it which you wanted, isn't that true?

A. We would have helped him, yes, sir, if he asked us to. But he told us he could get it for \$100,000 cheaper than we could, so why——

Q. In your discussion with Mr. Gallagher when you went to his office, was it your desire then to aid Mr. Liberman if you could in acquiring the Gallagher mill?

A. No, sir, I couldn't at that time. Mr. Liberman had——

Q. Was it——

Mr. Romley: Just a moment. I submit the witness should be allowed to complete his answer.

Mr. Moore: He had answered.

(Testimony of Robert T. Jenkins.)

Mr. Romley: No, he was in the middle of a sentence when he was cut off. [225]

Mr. Moore: I think he had answered it.

The Court: He said no and started to add something and counsel asked another question.

Mr. Romley: I think, if your Honor please, if it was in furtherance of the answer he should be allowed to complete the sentence.

The Court: I will let you bring that out.

Q. (By Mr. Moore): You say you couldn't help?

A. No, sir. At the time I was obligated not to say a word about having talked to Mr. Liberman and knowing Mr. Liberman was going to buy the plant or negotiating for it.

Q. You certainly didn't desire at that time to say anything to Tom Gallagher which would upset him and cause him to become irritated at Mr. Liberman, did you?

A. I didn't say anything to him that would cause him to become irritated at Mr. Liberman.

Q. What did you say to him?

A. I walked in and said to him, "Mr. Gallagher, in brief words I am here on a mission that I dislike very much. We are going to have to turn down your offer of the plant." He asked me why and I told him two things, first I think I told him we weren't financially able to swing the deal, and the second reason I gave him, our attorney, Mr. Cox—and both of these statements were not absolutely

(Testimony of Robert T. Jenkins.)

true, they were vague truths—had advised us that the milling agreement couldn't [226] be assigned, even though he had told us it could, and that—let's see—we had to have this contract to make the mill pay itself out at the price he was asking.

Q. What did you say to him about Mr. Liberman being over to Winslow?

A. He asked me what Mr. Liberman was doing at Winslow.

Q. What did you tell him?

A. I told him he had come over and set down and discussed the purchase of the plant.

Q. Didn't you in fact tell him Liberman came over there and scared you, you were afraid to buy it and if Tom Gallagher ever told that you would swear you never said it, didn't you say that to him that day? A. No, sir.

Q. What did you say to him that caused him to storm out of his office immediately after you left and refer to Mr. Liberman as a blackmailer and had a knife in his back?

Mr. Romley: We object to the form of the question, it is improper.

The Court: Objection sustained. [227]

After Recess:

Mr. Moore: We have no further questions.

Redirect Examination

Q. (By Mr. Romley): Mr. Jenkins, you were asked about the capacity of your mill, and I think you said that with two shifts it was either twenty-

(Testimony of Robert T. Jenkins.)

two or twenty-four million, I'm not sure which you testified to. Do you recall that?

A. Yes, sir.

Q. And did you say that was net log scale or net lumber recovery?

A. That is net lumber recovery, I'm sure, sir.

Q. Tell us what you mean by the term "net lumber recovery"?

A. That is the actual amount of lumber in board feet that we receive at the end of our operation, or that goes into the cars entirely for shipment.

Q. From the timber that is milled there?

A. Right, yes, sir.

Q. Now, is the net lumber recovery in your experience, has it been more or less than the amount of timber that goes through the mill?

A. It's more, sir.

Q. More? [228] A. Yes, sir.

Q. And what term do you use in designating the timber that goes through the mill as distinguished from net lumber recovery?

A. Net log scale.

Q. And what is the—you say that it's been your experience that the net lumber recovery is greater than the net log scale? A. Yes, sir.

Q. Is that sometimes referred to as the overrun?

A. Always referred to as overrun, yes, sir.

Q. Now, with regard to the Nagel mill, has it ever produced more than the twenty-two or twenty-four million of net lumber recovery?

(Testimony of Robert T. Jenkins.)

A. Yes, sir.

Q. With the same mill that is there now substantially?

A. No, sir, with one of—inferior to the one that's there right this minute, but at 1958 it was the same mill, yes, sir.

Q. 1958 it was the same. And what is the maximum amount of net lumber recovery that you have had in the Nagel mill?

Mr. Moore: Up to what time, Mr. Romley?

Mr. Romley: Well, up to 1958?

A. Prior to 1958?

Q. (By Mr. Romley): Yes. [229]

A. In excess of 30,000,000 feet.

Q. And was that with two shifts then or with a different setup?

A. That was with the third shift.

Q. With the three shift operation?

A. Yes, sir, part of the mill.

Q. Your mill then has produced upwards of 30,000,000 feet or at least 30,000,000 feet on a three shift operation?

A. Yes, sir, in excess of 30,000,000.

Q. In your opinion was the Gallagher mill in '58 and is it now capable of producing as much lumber from timber as the Nagel mill?

A. Yes, sir.

Q. You have told us in answer to questions by Mr. Moore of the statements you made to Mr. Gallagher in his office on September 23rd, 1958, as you

(Testimony of Robert T. Jenkins.)

have said within 30 minutes after you signed the September 23rd letter? A. Yes, sir.

Q. Have you not? A. Yes, sir.

Q. Did you state at that time to Mr. Gallagher what were facts or did you make the statement to him for any other reason?

A. I told him what Mr. Liberman, Dale Nelson and I had discussed I would tell him in Mr. Liberman's office earlier [230] that morning.

Q. How did that discussion earlier that morning in Mr. Liberman's office come about with reference to what you were to say to Gallagher?

A. Mr. Liberman said—he asked me if I had an appointment with Tom, I believe, and I said, yes, that we were going right on over.

Then we went into the signing the agreement.

Mr. Liberman, after the agreement was signed, Mr. Nelson and I had read it, said, "Well, I sure don't want you to tell Tom that you have been over here to see me. What are you going to tell him?" And I said, "Well, I'm just going to tell him we are out of the deal completely, we are exercising our first refusal." And he said, "Well, he's probably going to be wanting some reasons."

So we made up these two reasons in his office at that time.

Q. Did anyone suggest those reasons?

A. Yes, sir.

Q. Who did?

(Testimony of Robert T. Jenkins.)

A. I believe Mr. Liberman suggested that we wouldn't be financially able, and that I put in the Cox suggestion myself.

Q. I see. And were those the reasons then you told Gallagher what you did say to him?

A. Those were the reasons, but they may not have been [231] suggested by the people. You understand I'm just recalling from memory, one or the other of us suggested them but it was agreed at that time that that was what I was to say.

Mr. Romley: Now, I understand from counsel, if your Honor pleases, that they still do not have the figures but will have them later. May I reserve my going into this matter?

The Court: Very well.

Mr. Moore: We have them now if you want to take the time, or if you want to go ahead we can check them later.

Mr. Romley: Perhaps it will save time if you dig them out later then.

I believe that's all at this time.

Mr. Moore: No further questions.

Mr. Romley: You may step down.

Mr. Kirkpatrick, will you step forward and be sworn, please?

DAHL Y. KIRKPATRICK

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Will you state your name, please, sir? [232]

A. Dahl Y. Kirkpatrick.

Q. Where do you live, Mr. Kirkpatrick?

A. In Albuquerque.

Q. And how long have you lived there?

A. Ten and a half years.

Q. What is your business or profession?

A. I am a professional forester and I work for the United States Forest Service.

Q. Are you employed with the United States Forest Service in your position at Albuquerque?

A. Yes, I am.

Q. How long have you been with the Forest Service? A. Thirty-one years.

Q. Ten and a half of those years have been in Albuquerque? A. That's right.

Q. In what capacity are you there, sir?

A. I am Assistant Regional Forester in charge of the Division of Timber Management in the office of the Regional Forester, Region 3.

Q. You are the Assistant Regional Forester there, you say? A. Yes.

Q. Over what states does the Albuquerque office have jurisdiction, if I may use that term?

(Testimony of Dahl Y. Kirkpatrick.)

A. The states of Arizona and New Mexico, national forests [233] in these two states.

Q. I see. Have you had any experience in the national forests other than in New Mexico and Arizona?

A. Yes, in the states of Oregon and Washington before I came down here.

Q. Did you first go with the Forest Service in one of those two states? A. That's right.

Q. Then may I assume, sir, that you were with the Forest Service in Washington or Oregon, say, for approximately twenty years before coming to New Mexico? A. That's right.

Q. Is that right, sir? A. That's right.

Q. From the experience you have gained with the United States Forest Service, extending over these thirty years, and in these two different areas, New Mexico-Arizona and Washington-Oregon, are you in position to say and do you know if the timber situation in your new area, say in Arizona, is the same as in Oregon or Washington or does it differ in any material respect?

A. Well, yes, it differs in a material respect.

Q. Will you tell us what that difference is?

A. There is far less timber available in these two southwestern states than there was in Oregon and Washington. [234] The quality of the timber is somewhat different, of course the species are different, except that we have Ponderosa pine on the West Coast and Oregon and Washington, we have

(Testimony of Dahl Y. Kirkpatrick.)

Ponderosa pine here too as our principal species in this area. But it is not the principal species up there.

Q. Do you know the sort of timber available to lumber mills in Oregon and Washington insofar as private or public is concerned?

A. Oh, in a general way. In the Pacific Northwest there is considerably more private timber available than there is in the Southwest, even proportionately to the amount of federal timber that's available here.

Q. So a saw mill then in the northwest area has two sources of supply, U. S. Forest Service timber and private timber?

A. Some of them do, not all of them, of course.

Q. Now, are you acquainted with Mrs. George Nagel and with Robert Jenkins?

A. Yes, I am.

Q. How long have you known them, sir?

A. I have known Mrs. Nagel since I came to this region in 1950. I can't recall just when Bob came into the picture, I guess it might have been '52 or '53 or '54.

Q. Are you acquainted also with Mr. Laurice Liberman who is seated here? [235]

A. Yes, I am.

Q. How long have you known him?

A. Maurice was in the business when I first came to the region also.

Q. So you have known him and Mrs. Nagel perhaps substantially the same length of time?

(Testimony of Dahl Y. Kirkpatrick.)

A. That's right.

Q. And has your acquaintance with them been more or less on a professional basis by reason of your position?

A. Yes, and on a business basis. We have dealt with them both continuously through the years.

Q. I assume you have been to Winslow?

A. That's right.

Q. On a few or many occasions, sir?

A. Many, I'd say.

Q. Are you acquainted with the operation of the Duke City mill there now and the operation of the Nagel mill?

A. Yes, in a general way.

Q. And the Duke City mill as you understand is the same mill that was formerly operated by the Gallagher-Kaplan interests, is that right, sir?

A. That's right.

Q. Were you familiar with that operation before it was sold to Duke City?

A. That's right. [236]

Q. Mr. Kirkpatrick, do you have any opinion as to whether these two operations in 1958, the Gallagher mill and the Nagel mill, were substantially similar?

A. We have always considered that they were about the same. They have both about the same capacities, and each purchased about the same amount of national forest timber, cut it.

Q. And that prevailed in '58 and has continued to prevail since?

(Testimony of Dahl Y. Kirkpatrick.)

A. I wouldn't know the cut of each of the mills in 1958, I'm sorry.

Q. You are speaking only in approximate figures, is that right, sir?

A. That's right, yes.

Q. Do you know the source of supply of these two mills in Winslow? A. Yes.

Q. And what is that source, sir?

A. The national forest timber contribute to both of the mills and has, more recently each of them have acquired rights to cut Aztec timber and have been manufacturing Aztec timber along with the national forest timber.

Q. Is the Aztec timber located in the same forests?

A. It's intermingled with the national forest timber on alternate sections. [237]

Q. Alternate sections? A. That's right.

Q. This timber then that is available for the two mills in Winslow comes from the Sitgreaves National Forest? A. That's right.

Q. That is some 20 or 25 miles south of Winslow, am I correct on that, sir, approximately?

A. It's a little farther than that. I think it's about 35 miles to the edge of timber from Winslow.

Q. Do you know of any other private timber, if we may use that term in referring to the Aztec timber, that is available to supply either of these mills in Winslow?

(Testimony of Dahl Y. Kirkpatrick.)

A. There is none except very minor amounts on small private tracts.

Q. Then with that exception would you say the total source of supply to these two mills is from the Sitgreaves National Forest, is that right?

A. From the Sitgreaves National Forest if you include the Aztec timber with the Sitgreaves.

Q. Yes. A. That's right.

Q. Now, Mr. Kirkpatrick, does your office keep any records—I'm sure it does, so maybe I'd better not ask it in that way. I withdraw that and ask you this, sir:

Is it your office that handles the sale of United [238] States Forest Service timber to these two mills in Winslow?

A. We delegate the responsibility for sales to the Forest Supervisor who is located at Holbrook for the Sitgreaves Forest. But my office and the office of the Chief of Forest Service has supervisory responsibilities and we do assist the supervisor in making and handling the sale business on his forest.

Q. Is the supervisor you have mentioned in Holbrook under the supervision of the New Mexico office? A. That's right.

Q. How are those sales made by the Government to the mill operators?

A. Do you want the mechanics of making an individual sale now?

Q. Well, yes, tell us what you do in initiating a sale and the time you do so and what factors you take into consideration?

(Testimony of Dahl Y. Kirkpatrick.)

A. I perhaps should start by saying that the sale program for the working circle in which these mills have been getting their supply of timber, we call it the Chevalon working circle, is covered by a management plan and the management plan schedules the rate at which the national forest timber will be cut. And then pursuant to the management plan and in order to carry it out we divide the timbered area into sales blocks of a size that is suited to the [239] established industry and having determined a sale to be prepared, we go into the woods and make a cruise of the timber and determination of its quality, and finally make an appraisal of its value.

Having done this we advertise the timber for sale for a period of 30 days with an established minimum price, and accept bids at the end of that period and the timber in the Chevalon working circle is sold to the highest qualified bidder, and the qualifications, of course, are that he must have facilities and the ability to operate the timber and that he must have agreed to pay at least the minimum price.

Q. How many are there who meet the qualifications you have mentioned with regard to timber from the Chevalon working circle and the Sitgreaves National Forest?

A. There are only two that are so situated that they can practically operate within the Chevalon working circle.

(Testimony of Dahl Y. Kirkpatrick.)

Q. Are those the Nagel mill and the Duke City?

A. Those are the two people in this case.

Q. Now, does the office in Albuquerque keep records of these notices of sale and of the bids that are submitted?

A. Yes, we do, on sales that are of a size greater than 10,000,000 feet.

Now, the 10,000,000 foot sales are sold by the Forest Supervisor, those that are larger than 10,000,000 and between ten and thirty million are approved by the Regional Forester, [240] and the ones that are over thirty million feet in size are approved by the Chief of the Forest Service.

Q. In Washington?

A. In Washington.

Q. I see.

A. However, we in our office keep the records on those chief sized sales.

Q. I see. Do you know whether the sales that have been made from the Chevalon working circle during the past 15 or 20 years, what range they have been, whether between ten and thirty that you mentioned or over thirty?

A. I have some notes here, sir, that I could— if you would permit me to check it.

Q. You may refer to your notes in order to answer any of the questions either counsel put to you.

A. Okay. Would you like a listing of some of the principal sales that we have made?

(Testimony of Dahl Y. Kirkpatrick.)

Q. I beg your pardon?

A. Would you like a listing of some of the principal sales that we have made?

There is one for seventy-seven million, one for twenty-nine million, one for twenty-five, one for thirty-one, one for twenty-one, one for nine.

Q. And are these out of the Chevalon working circle?

A. That's right, they are all in the Chevalon working circle. [241]

Q. Are there records in the office that reflect who has bid on the purchase of timber?

A. Yes, sir.

Q. Have you examined those records?

A. Not recently, but I am acquainted with them.

Q. I see. Are those records prepared and kept in the usual course of the business of the Forest Service?

A. That's right.

Q. Do you know as far back as, say, 1942 or '45 what the situation is with respect to bids?

A. Yes, sir.

Q. For timber in the Chevalon working circle?

A. Yes. Would you like me to tell you what the situation is?

Q. Yes, tell us, yes, sir, if you please.

A. The initial sale that was offered in the Chevalon working circle was for seventy-seven million board feet with the intention of trying to get some cuts started in the working circle, and it had been inactive virtually up until that time. That initial sale there was competition, it was offered two times.

(Testimony of Dahl Y. Kirkpatrick.)

The first time the highest bidder was judged not to be qualified and all of the bids were rejected and it was advertised again. It was finally sold to Whiting Brothers [242] but there was competition on the offering from Southwest Lumber Mills, now Southwest Forest Industries.

Q. In what year was that?

A. The date of the sale is 11/5/42.

Q. In '42. Now since 1942 up to the present time, has there been any competition in the bidding for timber in the Chevalon working circle?

A. There has been none.

Q. There has been none? A. That's right.

Q. I believe a sale recently was concluded sometime this past month, wasn't it?

A. That's right.

Q. Do you recall the details of that sale, sir, perhaps as to date and quantity and purchaser?

A. I don't have the date, the contract is not yet signed, I believe.

Q. Do you know the date——

A. The timber was offered——

Q. ——of the offer?

A. No, I don't know the date of the offer either, but bids, it seems to me, were received on the 12th of April. Maybe it was the 12th.

Q. I see. A. About that time. [243]

Q. On or about the 12th of April of this year?

A. Yes.

Q. And how much timber was sold at that time?

(Testimony of Dahl Y. Kirkpatrick.)

A. Twenty-seven million three hundred thousand feet of Ponderosa pine and minor amounts of other species, I don't seem to have those.

Q. Fir was it?

A. Yes, it would be Douglas fir and then White fir.

Q. Now, Mr.—

A. Yes, here it is. 27,300,000 feet of Ponderosa pine, 280,000 Douglas fir, 120,000 feet of White fir.

Q. And that was sold by the U. S. Forest Service on or about April 12th of this year?

A. That's my memory as to the date, I think it was the 12th of April.

Q. And was it advertised for sale in the manner you have previously indicated?

A. That's right.

Q. And do you know who submitted a bid?

A. Nagel submitted the only bid that was received.

Q. Is there another sale of timber from the Chevalon working circle in the making or about to be made, sir?

A. That's right. I think that the advertisement already appeared on the second of the sales; we know it as the Limestone sale. [244]

Q. And—

A. It has a volume of twenty-six million, one hundred thousand feet of Ponderosa pine, two hundred forty thousand feet of Douglas fir and four hundred sixty thousand feet of White fir.

(Testimony of Dahl Y. Kirkpatrick.)

Q. Altogether does that amount to twenty-six thousand eight hundred feet?

A. Yes, it does.

Q. Twenty-six million?

A. Eight hundred thousand.

Q. Twenty-six million eight hundred thousand?

A. Yes.

Q. I'm sorry, sir. Did you say that there will be sold from the Chevalon working circle in a sale now being advertised, twenty-six million eight hundred thousand feet? A. Yes, sir.

Q. That's net log scale, is it not?

A. That's right, all of our sale volumes are on net log scale.

Q. Are on net log scale basis. When the sale of the timber involved in the April, 1960, sale was made out or planned, was that done by the Forest Service with any particular mill in mind as a potential purchaser?

A. Yes, it was. It was done that way because intermingled with this national forest timber included in that sale [245] is Aztec timber which is in the ownership of Mrs. Nagel.

Q. And is it the practice of the Forest Service and has it been through the years when providing or making arrangements for a sale to take into account who the potential customers or bidders might be?

(Testimony of Dahl Y. Kirkpatrick.)

A. Well, as a practical thing we do that. We have had very little experience or very little necessity to recognize the effect that private timber will have on our timber sale offerings, because in most places we don't have any private timber.

But in the case of this so-called Wiggin sale, private timber had a strong influence on the fixing the boundaries of the offering. Now we had no control, of course, of who might have bid on the timber but the national forest timber in the area was made available in such a way that it fitted in with the Aztec timber in Mrs. Nagel's ownership.

Q. I see. Now with regard to the sale which is now being published, the notice of which is now being published on this 26,800,000 feet, were the plans with regard to that made with any potential bidder or customer in mind?

A. With the same identical considerations as applied in the case we just spoke of, because Duke City owns the private Aztec timber that's intermingled with the national forest timber being offered for sale.

Q. I see. Then is it fair to say, Mr. Kirkpatrick, that [246] the sale made in April, 1960, was, in a sense, keyed to the Nagel mill and the one about to be made and now in the process of being published with Duke City in mind?

A. That is correct.

Q. That procedure, keying or having in mind the potential customers, has prevailed up to the present, has it, sir?

(Testimony of Dahl Y. Kirkpatrick.)

A. In a measure it has. The consideration has been different in the past because until the Aztec case was decided against the United States we had no concern with private timber in the Chevalon working circle.

Before the principal keying, as you call it, of timber offerings to individual prospective purchasers was based principally on the—or was a matter principally of timing, when a sale was about to run out on which one of these customers had been operating we usually managed to get another one offered about a time that would suit his necessities.

Q. In other words, if we may translate that from the general to the precise situation, do you mean that if a Nagel contract was about to run out for timber—I'm speaking of prior to the Aztec deal—you would try to determine what should be sold and what its needs were and then notice it for sale with that in mind?

A. That's right, timing it so the sales were fitted in with the needs of the industry or purchasers we had.

Q. And the same prevailed with regard [247] to—

A. That's right.

Q. —Gallagher, who was in the picture at the time?

A. That's very true.

Q. Now, will that same procedure be, in your opinion, followed in the future after this Aztec timber is cut out?

(Testimony of Dahl Y. Kirkpatrick.)

Mr. Moore: I think that's a little speculative, if the Court please.

I appreciate this gentleman is well experienced in the field, and what you think might happen with respect to governmental policies and governmental forests, I believe, is absolutely speculative. We object upon that ground.

The Court: He may answer.

A. I would presume that the same course will be followed in the future. Our management plan that I referred to a while ago contemplates that we will sell the stated amount each year from the—that is we will secure the cutting of a stated amount each year from the working circle.

Well, the only way to do that and to sustain the industry and the people that are dependent upon the industry is to keep the sales fitting on end to end, if you see what I mean.

Q. I see. Now, the management plan—perhaps I should ask you, sir: I know from my talks with you what it is, but it's not in the record. Will you tell us what the management plan is and how it is prepared and what function it has in the [248] entire Forest Service picture?

Mr. Moore: Do you have a copy of it?

Mr. Romley: Well, I think that there is no use putting in many pages, I'd rather have the witness tell us and if you wish it, Mr. Moore, it can be produced.

(Testimony of Dahl Y. Kirkpatrick.)

A. All national forest timber is managed under the terms of what we call timber management plan. The timber management plans are made for individual working circles, the area is divided into what are logical units for management.

They are based on as good an inventory as we can make of the total resource, they determine what the sustained yield of the working circle in question can be, and establish that as a limit of the cut that will be permitted there.

In addition, the management plans contain some prescriptions for management. They say what we—how we are going to dispose of the slash that's created by the logging, what we are going to do to secure regeneration, for example, and what we are going to do to improve the stands as they are cut over, and they include generally a statement of the sale program that's going to be followed in the working circle. [249] That is a general picture of what a management plan is.

Q. In that management plan does the Government attempt to make a scientific approach in projecting the amount of timber that will be available in the given source, applying it to Sitgreaves National Forest?

A. Yes, we do, as well as we can. As I said, we do have a definite policy of managing the National Forest on a sustained yield basis. So in making the management plan ordinarily the firm part

(Testimony of Dahl Y. Kirkpatrick.)

of the plan covers only a ten year period or in some cases a twenty year period, and it is based then on known volumes as of different date.

Q. Yes, sir.

A. And then to be sure or give some assurance at least we are not exceeding the capacity of the land to produce timber for the future and we won't jeopardize our sustained yield principle we make forecasts in these plans of anticipated growth in the future and determine whether or not the cut can be sustained rather indefinitely at the same level we are starting out on.

Q. Is that management plan prepared and made up by men who are qualified and experienced in ascertaining the information necessary?

A. That is true. They are professional foresters who work on management plans. We use the best techniques we know how, including the research information available on [250] growth and yield.

Q. Do you have such a management plan for the Chevalon working circle? A. We do.

Q. And is that prepared and kept and maintained as a part of your usual work in the Forest Service? A. That is right.

Q. Copy of it is on file in your office?

A. Yes.

Q. You have a copy of it with you?

A. I have a copy right here.

Q. Are copies of those made available at the request of the various mill operators?

(Testimony of Dahl Y. Kirkpatrick.)

A. They would be if they were requested. We have very few new operators who are interested, but anyone who wants them can have them. They are public information.

Q. In this management plan for the Chevalon working circle, were any projections made with reference to the amount of timber that will be available, and I'm speaking of net log scale, looking forward from now? A. Yes, sir.

Q. What projections have been made in that regard, sir?

A. The latest revision of this Chevalon management plan covers the period of 1958 to 1968 inclusive. In this revision of the plan is established an allowable annual cut to be taken [251] from the Chevalon circle during this ten-year interval I just now mentioned, that is twenty-four million board feet per year. And the projections that were made in connection with that revision of the plan the cut from 1968 for the ensuing twenty years was calculated to be eighteen million one hundred sixty-three thousand, I believe.

Q. Feet per year?

A. Board feet per year.

Q. Now, sir, the first figures you gave us I believe were twenty-one million board feet net log scale through the year 1968, is that it?

A. 1968, that is right, inclusive.

Q. And I think you said, sir, there are only two mills that now are supplied timber from this Chevalon working circle? A. That's right.

(Testimony of Dahl Y. Kirkpatrick.)

Q. So if this were divided on an equal basis it would be ten and a half million board feet net log scale through the year 1968 for each of these two mills?

A. That is correct.

Q. And for the twenty years, commencing with the year 1969, if I understand you correctly, the projection is for eighteen million one hundred sixty-three thousand board feet, net log scale, per year from the Chevalon working circle?

A. That is right. [252]

Q. Again assuming that would be divided in half by the two mills it would be just one-half of that sum for each mill, is that right, sir?

A. Yes, that is right.

Q. In your opinion, sir, based on all your experience and knowledge in the field, are these projections reasonably accurate, sir?

A. Well, they are reasonably accurate, but they are not and cannot be guaranteed. Many things can happen to upset our calculations. A serious fire has occurred in this working circle that necessitated revision of this management plan in 1957, as an example. The reacquisition of some of the Aztec land would tend to boost the allowable cut. It may be that the growth predictions that we have in here will not be borne out by actual growth, series of drought years might interfere with that. The predictions I would say are only approximations, they cannot be guaranteed.

Q. They cannot be guaranteed?

A. That's right.

(Testimony of Dahl Y. Kirkpatrick.)

Q. With reference to the amount of allowable cut, this twenty-one million you referred to per year through the year 1968 is an allowable cut, am I using the right language? A. That is right.

Q. Does it sometimes happen, sir, that the allowable cut under a contract exceeds the amount provided for in the [253] original estimate here?

A. That's right, we have difficulty in so writing the contract we can control the allowable cut which we are aiming at precisely year by year. Contracts by their very nature must afford some latitude for change and the result of that is that in some years we get overcuts and some years we get undercuts, but in the long pull our objective is to balance them out.

Q. Is that objective usually accomplished?

A. Reasonably, except that when some disaster occurs like we had with the Dudley fire we didn't accomplish it very well. I went to the trouble last night of checking up to see if the record shows the amount of cut taken from the working circle in 1956, it looks like instead of the twenty-one million we were expecting to or the twenty-two, we will get thirty-four.

Q. In 1956 the cut was thirty-four million instead of twenty-two?

A. Correct, of the Forest Service in the working circle. I don't know what the Aztec timber might have been cut.

(Testimony of Dahl Y. Kirkpatrick.)

Q. You made reference earlier in your testimony, Mr. Kirkpatrick, to the fact that when you put up the Forest Service timber for bid you specify a minimum price which will be accepted or considered, is that right, sir?

A. That is right. [254]

Q. Is there any manner in which that minimum price is arrived at by the officials in your office?

A. Yes, we arrive at it by what we call an analytical appraisal.

Q. What factors are taken into consideration in arriving at that figure, sir?

A. The quality of the timber, the total anticipated costs of producing lumber from it, an allowance for profit and risks to the purchaser and the residual as to stoppage price we charge.

Q. How do you arrive at these total approximate costs of production?

A. The costs of production that we use in appraisals are regional average costs and they are determined from a study of the books of all of our purchasers in the region. The intention is to arrive at costs which are average and which will not penalize an efficient operator or subsidize a poor one.

Q. One of the factors then in establishing the minimum costs that will be considered, the minimum price that will be considered in the sale of the timber is try to provide for a reasonable profit to the operator, based on these approximate costs?

A. That is true.

(Testimony of Dahl Y. Kirkpatrick.)

Q. And those are regional costs, averages you have taken [255] into account?

A. That is true.

Q. Is that involved, so far as we are concerned, Mr. Kirkpatrick, only in these two states?

A. That is right.

Q. How many operators are there in the two states?

A. There are about twenty-one operators of a size which we use in assembling our average cost information.

Q. Duke City is one of the operators?

A. Duke City is one of them.

Q. With several mills rather than just one?

A. Yes, Duke City has several operations.

Q. And Nagel is one of those you take into consideration too? A. That is true.

Q. Mr. Kirkpatrick, these figures that are given you which you take into consideration in establishing or specifying a minimum price are I suppose given you in confidence, is that right?

A. That is entirely correct.

Q. You use them for your purposes in arriving at these figures? A. That is correct.

Q. Those figures furnished you by both Duke City and by Nagel in practice? [256] A. Yes.

Q. In your opinion, sir, are both of these mills, Duke City and Nagel efficient operators?

A. I would say that they are operators of average efficiency.

Mr. Romley: You may cross examine.

(Testimony of Dahl Y. Kirkpatrick.)

Cross Examination

Q. (By Mr. Moore): Mr. Kirkpatrick, the management plan that you referred to, was that limited—that is limited, is it not, to the Chevalon working circle?

A. The one I held up and referred to here, yes, that is correct.

Q. And that had to be revised in 1958 because of a fire? A. That is true, sir.

Q. That was what was referred to as the Dudley Lake fire? A. That is right.

Q. How many thousand acres of timber were burned in that fire?

A. Six thousand twenty-one acres of one type plus nineteen hundred forty-three acres of another, adding up to about—what is that—seven thousand nine hundred acres. [257]

Q. Is that the fire in June, 1956?

A. That is correct.

Q. I was of the impression—I don't know where I got it—it was in excess of twenty thousand acres.

A. That was the total area burned. You asked me about the timber area burned. It was not all timber type.

Q. The fire spread over twenty-two thousand and only seven thousand acres of it was acreage that had timber?

A. Commercial timber land acreage amounted to, I think I said seven thousand nine hundred acres.

(Testimony of Dahl Y. Kirkpatrick.)

Q. Did you calculate in that, Mr. Kirkpatrick, after the number of millions of net log scale lumber that might have been involved in that fire?

A. Yes, we did at the time, sir. I don't know whether I have the record here or not. Let me review this file for a moment. I see nothing here that says specifically what the volume of timber burned in the fire was.

Q. Originally, Mr. Kirkpatrick, is it your recollection that the sales in the Chevalon working circle, the condition of the sales required band mill saws?

A. There was a period during the development or program for this working circle when we did require that the timber sold through the national forest land be manufactured with a band mill.

Q. That requirement is not in existence [258] now?

A. That requirement does not exist any more.

Q. When you were talking about qualified bidders just what are the qualifications a bidder must have?

A. He must either have a sawmill and a logging outfit capable of cutting and manufacturing the timber, included in the sale at the rate that is contemplated in the sale contract or he must show he has cash and working capital sufficient to install such facilities.

No. 17642

United States
Court of Appeals
for the Ninth Circuit

MAURICE LIBERMAN, ET AL,
Appellants,

vs.

GEORGE H. NAGEL, ET AL,
Appellees.

Transcript of Record

In Four Volumes

VOLUME II.

(Pages 481 to 968, inclusive)

Appeal from the United States District Court for the
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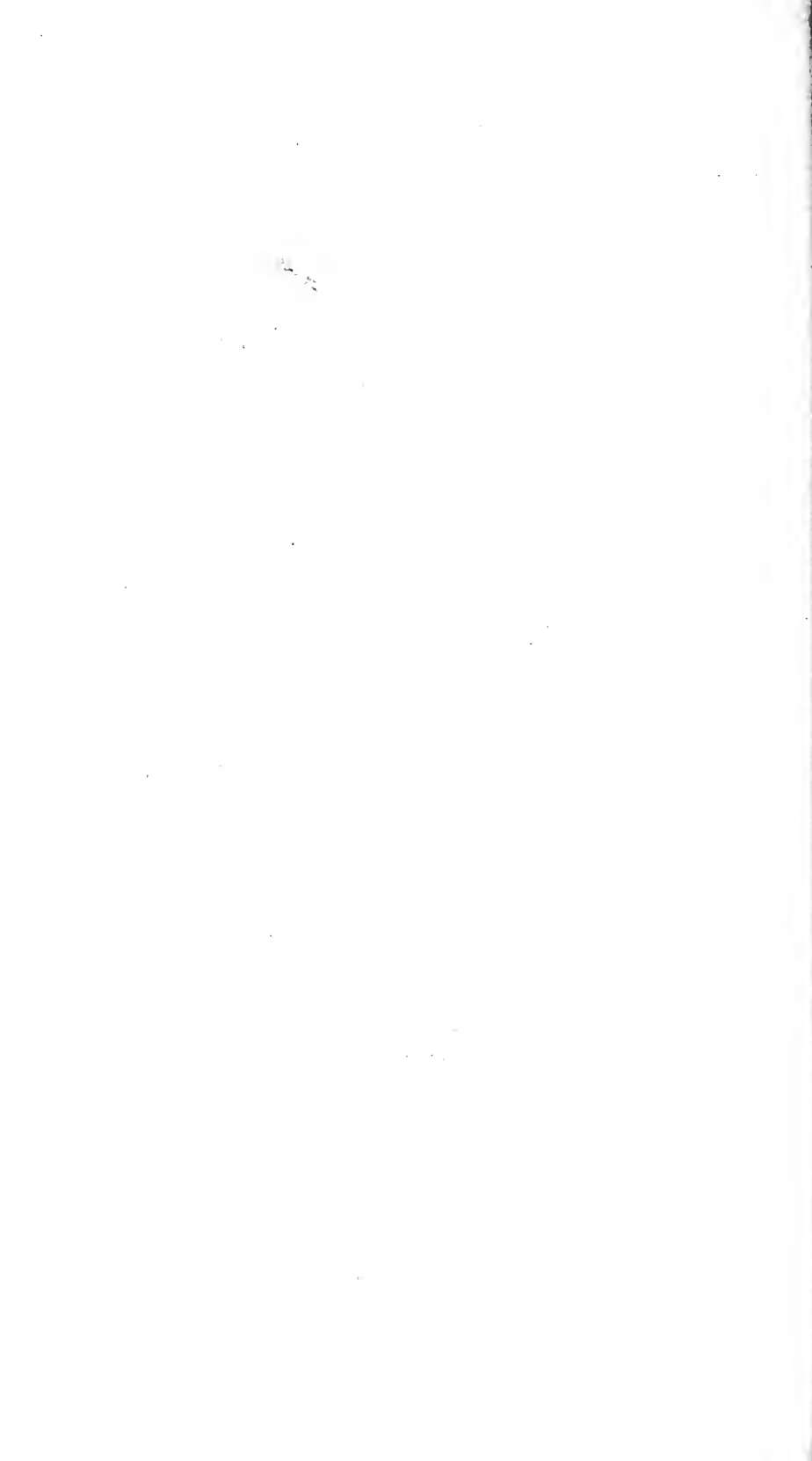
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(Testimony of Dahl Y. Kirkpatrick.)

Q. So it is not limited then, Mr. Kirkpatrick, if I understand you correctly, to operators in the immediate area who already have installations?

A. Not at all.

Q. So far as the qualifications are concerned, it is purely financial qualifications, they can put up the deposit and show some place they have the facilities to manufacture it or have the funds with which to acquire those facilities?

A. That is correct.

Q. And it is quite possible, is it not, that a circular sawmill could be set up in the forest in the Big Chevalon circle?

A. By our present program it could.

Q. How close is Payson geographically to the Chevalon working circle, do you know, or approximately?

A. I don't know the road mileage I am sure, but I would say it is in the neighborhood of fifty miles. That would [259] bear checking. I couldn't tell you.

Q. On the map it looks like it is closer than Winslow is, but I don't know about the road how far that is. I wondered if you would know.

A. I know the route of the road all right. In order to get from the south extremity of the Chevalon working circle to Payson you have to go east a good many miles along the Mogollon rim in order to get the road that goes to Payson. I suspect be in the neighborhood of forty-five or fifty miles.

(Testimony of Dahl Y. Kirkpatrick.)

Q. Of course it is not inconceivable a road could be built from the southern boundary of the Chevalon working circle to Payson that would shorten the haul considerably?

A. It would be very difficult.

Q. It would be difficult, but it could be done, couldn't it?

Mr. Romley: I object, your Honor, it is too speculative.

The Court: No, he may answer.

A. Oh, yes, it could be done, but I think the present facilities are more economical way to get it out of there than to build another road.

Q. (By Mr. Moore): When these sales are put up, Mr. Kirkpatrick, you say they are advertised, is there an advertisement published in the newspaper? [260]

A. That is true.

Q. And the Chevalon working circle, is that published only in the newspaper in Holbrook or published in some other paper?

A. We normally publish only in the Winslow newspaper, the Winslow Mail of the sales in the Chevalon working circle.

Q. In addition to that publication you have a mailing list of operators in your office?

A. That is true.

Q. Some forty-seven of them, do you recall?

A. No, there are a great many on that list and people asking to be put on and others we have no response from that we drop off.

(Testimony of Dahl Y. Kirkpatrick.)

Q. That list is revised each year or so?

A. We have no established period for revising it. We put on any new applicants that ask to be put on at the time he asks.

Q. And the prospectus and complete information concerning a prospective sale is mailed to each firm or individual on that list?

A. That is true, a prospectus and copy of the advertisement and bid form.

Q. Each and every sale is subject to competitive bidding out of the Chevalon working circle, that is right?

A. That is true. [261]

Q. There are no requirements under your management plan or any regulations in your office which would either require or permit you to offer a private sale of that timber to one individual?

A. That is correct.

Q. Now, there have been instances in the region where there have been bids over the minimum price fixed by the Forest Service?

A. That is true.

Q. And there have been instances in which there was rather spirited competitive bidding, is not that true?

A. That is true.

Mr. Romley: I object to that unless it is made more definite, what may have occurred in other districts is of no consequence.

The Court: This is within the region?

Mr. Moore: Within the region.

Mr. Romley: Not the Chevalon working circle. That is the point of my objection.

(Testimony of Dahl Y. Kirkpatrick.)

The Court: I understood the forest region is what you're talking about.

Mr. Romley: That is right.

The Court: No, I think he may answer.

Q. (By Mr. Moore): You say there are twenty-one operators in your region which is Arizona-New Mexico? [262]

A. That is not the total number of operators. I tried to say that is the number of operators from whom we have been able to get suitable costs and selling price data for use in our regional averages.

Q. How many operators are there in the two regions that would be qualified bidders, approximately, if you don't know exactly, Mr. Kirkpatrick?

A. I would say this same group would be about the limit of those that would be qualified to bid on sales of the size that we customarily have sold in the Chevalon working circle. There are a host of small mills, none of whom could compete on the sale of the size or rate of the cut it required to meet.

Q. What number?

A. I would say the same, twenty or twenty-one.

Q. Do you know offhand how many of those are located or have operations in Arizona?

A. I would say about twelve of them.

Q. About twelve of them. The Forest Service I guess, is it all in the northern part of Arizona?

A. Very little in the southern part of the state.

(Testimony of Dahl Y. Kirkpatrick.)

Q. The Adler Unit 1956 sale out of the Chevalon circle, do you recall it was sold to Porter who transported the logs to Heber for manufacture?

A. That is correct. That sale was a sale of [263] burned timber sold for emergency basis for quick salvage.

Q. That was after this fire we talked about?

A. That is right, the same Dudley Lake fire.

Q. If the cut was about completed on a sale in the Chevalon working circle and the owner of the cutting rights of that particular sale needed additional timber, would you be able to put up additional timber for sale unless that sale conformed to your management plan? A. No, sir.

Q. So that actually the determination of what is sold and when it is sold is really the management plan you have adopted? A. That is right.

Q. Insofar as your appraised value you were talking about, Mr. Kirkpatrick, and insofar as the Forest Service is concerned, is that appraised value and market value of that timber the same?

Mr. Romley: I don't think he referred to it as the appraised value, your Honor. I object to the form of the question.

Mr. Moore: The minimum price then, that was what I was after. The minimum price you set on it—

Let me ask the question. Is the minimum price that is fixed on these respective sales, insofar as the Forest Service is concerned, the same as what you

(Testimony of Dahl Y. Kirkpatrick.)

would consider [264] the market value of that timber to be at that time?

A. That is what we attempt to achieve with our appraisal is establish what we call a fair market value for the timber.

Q. In doing that you check costs, you check location, availability of timber, the distance of a haul and all of those things, what roads have to be built?

A. That's correct.

The Court: Pardon me, Mr. Moore. It is 12:00 o'clock. We will recess until 1:30.

(Noon recess.) [265]

Afternoon Session, May 4, 1960, 1:30 O'Clock P.M.

DAHL Y. KIRKPATRICK

having been previously sworn, resumed the stand and testified as follows:

Further Cross Examination

Q. (By Mr. Moore): Mr. Kirkpatrick, I have just a few more questions I would like to ask you, please.

You said something this morning about two operators who could economically bid on forest sales in the Chevalon working circle. Now, there is an established operator at Holbrook, isn't there?

A. Not a saw mill operator.

Q. Doesn't Whiting Brothers have a saw mill there? A. No, just a planing mill.

(Testimony of Dahl Y. Kirkpatrick.)

Q. Just a planing mill. Porter has a saw mill at Heber? A. Heber, that's correct.

Q. Whiting or Kaibab—I don't know which—has a saw mill at Payson?

A. Kaibab is at Payson, that's right.

Q. Kaibab Lumber Company?

A. Yes. [266]

Q. And Kaibab Lumber Company has an established operation including a saw mill at Flagstaff?

A. Correct.

Q. And Southwest Lumber Mills has a plant at Flagstaff? A. That's correct.

Q. Now, do you recall, Mr. Kirkpatrick, whether there are any what we might refer to as geographical barriers that would interfere with transportation, that is hauling of logs from the Chevalon working circle over to Heber?

A. No, no impossible barriers. The route would be longer, I'm sure, than it would be to the manufacturing point at Winslow but there are no barriers that way.

Q. And the same is true with Payson except it's a longer haul? A. That is correct.

Q. Because of the Mogollon Rim?

A. That's correct.

Q. However, at Payson the manufactured product is much closer to the Phoenix market than Winslow is, isn't it? A. That's correct.

Q. Now, Mr. Kirkpatrick, we were talking this morning a little briefly about the advertising of sales and the mailing out of prospectus. That is

(Testimony of Dahl Y. Kirkpatrick.)

actually done, one, for the purpose of giving prospective bidders the opportunity to inspect the forest if they want to, isn't it? [267]

A. That's true.

Q. And by the use of that advertising system it absolutely prevents and prohibits the Forest Service from showing favoritism to one particular operator, if someone else wants to come in and bid, is that true? A. That's correct.

Q. It gives the public general information about these sales too from the newspapers?

A. True.

Q. And the Forest Service considers that that is probably one of the best ways to obtain the full value of the forests at these sales, by giving this varied advertising? A. That's correct.

Q. So with that program, Mr. Kirkpatrick, would you say that it is absolutely impossible for the Forest Service to show any favoritism either to Duke City Lumber Company or to Nagel Lumber & Timber Company with respect to sales in the Chevalon working circle?

By that I mean favoritism as to them as against some other operator who wanted to come in and bid on them?

A. Our sales are strictly competitive.

Q. This management plan—I couldn't think of the term—that you mentioned for the Chevalon working circle, it provides, does it not, Mr. Kirk-

(Testimony of Dahl Y. Kirkpatrick.)

patrick, that—and I'm referring to the plan revision, page 16, 1958 and 1963: [268]

“This management plan will be carefully reviewed in the light of conditions at that time. In the event that some or all of the Aztec lands are returned to national forest status or should other changes indicate a need therefor, the plan will be revised immediately.”

That's a correct statement from the report?

A. That is from the copy of the plan.

Q. That referred to the years 1958 and 1963, is that correct?

A. Yes.

Mr. Romley: Is it the two years or through the two years?

Mr. Moore: Each of those years is my understanding.

The Witness: Correct.

Q. (By Mr. Moore): And then in 1968 a complete revision of the management plan will be made in the light of data and conditions prevailing at that time?

A. That's correct.

Q. So that the management plan then is set up and specifically provides for a revision each five years, '58, '63 and '68?

A. It provides for review at each five-year interval.

Q. That's what I should have said, a review?

A. And a complete revision at the end of the ten-year period. [269]

(Testimony of Dahl Y. Kirkpatrick.)

Q. But a complete revision at the end of the ten-year period? A. That's right.

Q. With a five-year review and if deemed necessary or advisable it would be revised?

A. That's right.

Q. Now, there are several hazards, are there not, Mr. Kirkpatrick, with respect to the maintenance of national forests? Fire I'm thinking of is one?

A. That's true.

Q. You mentioned one rather substantial fire that occurred in 1956? A. Yes.

Q. Or '57, I don't remember which.

A. '56.

Q. '56 I believe it was?

A. '56 was the year of the fire. [270]

Q. It would be possible, would it not, for a fire to wipe out an entire working circle of the national forest? A. It could, yes.

Q. In periods of drought and dry weather and windstorms with lightning, that is particularly dangerous as a cause of starting forest fires, isn't it?

A. That is correct.

Q. As the population increases and roads are opened up and park facilities made available that increases the hazards of forest fires too, doesn't it?

A. The more people in the woods the greater the danger, I would say.

Q. Do you know of any instance where, not in this region, but I have in mind the Pacific north-west, somewhere in that area, a forest fire wiped

(Testimony of Dahl Y. Kirkpatrick.)

out an entire working circle or substantial part of the national forest?

Mr. Romley: We object, if your Honor please, as too remote, speculative, has no probative value. Conditions are different, traffic is different.

The Court: He may answer for what it is worth.

A. I have known of large fires in the Pacific northwest.

Q. (By Mr. Moore): How large, approximately?

A. My memory is that the Tillamook fire, which is a notable fire in that area burned over some three hundred thousand acres. [271]

Q. Was all of that three hundred thousand acres in what I might call productive forest?

A. It was.

Q. That is forest which was ready to be cut into logs and manufactured into lumber?

A. That is correct.

Q. You said this morning you couldn't guarantee that there would be twenty million feet per year, or whatever figure you were using in the Chevalon working circle. Could you guarantee there wouldn't be a forest fire that would wipe the whole thing out? A. No.

Q. You would like to if you could. If a forest fire is started, what is the effect of wind with respect to spreading or controlling or handling of it?

A. Wind is one of the most important factors that makes a forest fire difficult to control, very important.

(Testimony of Dahl Y. Kirkpatrick.)

Q. The fire that you mentioned this morning in 1956 that spread over twenty thousand acres but only seven thousand in the forest, in that particular instance, Mr. Kirkpatrick, the wind was blowing away from the forest and carrying the fire away from the forest into the scrub pines outside the forest? A. That is true.

Q. Now, in addition to fire hazards, do you have hazards in the forest, mortality hazards from insects, fungus, disease [272] and other items?

A. Yes.

Q. Is that a substantial hazard?

A. It is a substantial hazard, but normally those hazards aren't as devastating as a large scale forest fire.

Q. The Cebolla National Forest, that is in New Mexico? A. Yes.

Q. Because of a mortality rate there in the forest salvage plan of operation had to be put in effect that completely wiped out the forest, didn't it?

A. It very substantially reduced the forest. I should point out however that the site on which that forest was growing was not very good, they were right down by the desert edge, what we refer to as fringe.

Q. Have you had any trouble or difficulty with disease or insect infestation in the Sitgreaves National Forest any place?

(Testimony of Dahl Y. Kirkpatrick.)

A. Not of an epidemic nature. There has been endemic insect infestation there all the time as there are in most pine forest, but no losses of an epidemic nature in the Sitgreaves since I have been in the region.

Q. What you have experience there, could that develop to where there could be a substantial loss of available forest?

Mr. Romley: Just a moment. We object. The test [273] is not could it develop, as is it reasonably probable with the safeguards now being taken.

The Court: As a matter of possibility, I don't think it would help very much.

Q. (By Mr. Moore): Is there a probability that there may be a loss of timber in the Sitgreaves Forest as a result of insect infestation or disease?

A. Based on past experience I would say it is not very probable that epidemic losses would occur.

Q. The big danger as far as loss is concerned is forest fires, as I understand what you said, Mr. Kirkpatrick?

A. Correct.

Q. And that is a substantial danger?

A. Certainly.

Mr. Moore: I believe that is all.

Redirect Examination

Q. (By Mr. Romley): Does the Forest Service take any steps in safeguarding against forest fires?

(Testimony of Dahl Y. Kirkpatrick.)

A. Certainly. We have as good protective system as we can afford, but it doesn't assure, of course, there won't be any fires or that they won't get away.

Q. Is the Forest Service continuously trying to install better fire suppression methods? [274]

A. We are.

Q. Does that prevail in the Sitgreaves National Forest as well? A. It does.

Q. When you say you can't guarantee there won't be a fire, you couldn't guarantee that this building wouldn't burn down tonight, either?

A. No, sir.

Q. Do you know how many fires of any consequence have occurred in the Sitgreaves National Forest as far back as your knowledge goes, sir, to the present time?

A. Since I have been in the region there have been three rather destructive fires in the Sitgreaves National Forest, and that is in ten years, two of them in the vicinity of McNary and this Dudley fire that we spoke of here.

Q. The Dudley fire was the one that occurred in 1956? A. That is right.

Q. I believe your testimony this morning was to the effect that this projection of available timber in the Chevalon working circle was made after the 1956 fire, is that right?

A. The last projection.

Q. The one you said covered '58-'68?

A. That is right.

(Testimony of Dahl Y. Kirkpatrick.)

Q. And twenty years beyond?

A. That is right, the figure that we derived of eighteen [275] million a hundred and sixty-three thousand.

Q. Yes. In other words, the figures you gave us this morning with regard to the timber available through '68 and after '68 are after making allowance for the fire that occurred in 1956, is that right, sir?

A. That is correct.

Q. With regard to these other operators that Mr. Moore mentioned this afternoon, the Porter and Heber and Whiting at another place, Kaibab and Payson and Flagstaff and Southwest of Flagstaff, I think those are the ones he mentioned, had they been in operation for some time?

A. The plants have been in operation, the ownership has changed with respect to the Payson mill within the last two years. Kaibab has only owned it a couple of years.

Q. Their location has been the same?

A. That is right. The location has been the same.

Q. For several years? A. Several years.

Q. Have any of the operators of any of those plants that Mr. Moore mentioned and that I do now ever bid in the Chevalon circle?

A. They haven't.

Q. He asked you too I believe this morning if it wasn't a fact that spirited bidding sometimes occurs, and you responded in the affirmative I believe. Does that spirited [276] bidding usually occur at the initial sale in any area?

(Testimony of Dahl Y. Kirkpatrick.)

A. No, I would say not. I think our most spirited bidding occurs in areas where there are numerous small mills in operation and bid for small sales as a rule.

Q. You have said there has been no bidding, spirited or otherwise in the Chevalon working circle since 1942, I believe?

A. That is correct.

Q. Reference was made to the conditions that exist or existed in the Cebolla—I think is the way Mr. Moore pronounced it——

A. We call it Cebolla (indicating pronunciation).

Q. And you referred to it as the fringe area?

A. That is correct.

Q. Does that situation prevail or exist with regard to Sitgreaves, and more particularly the Chevalon working circle?

A. To a very limited part of the Chevalon working circle, the northern edge of the Chevalon working circle runs into the desert. Much the same condition prevails there as over an extensive area of the Cebolla.

Q. Was that factor taken into consideration in arriving at the projections stated in the management plan about which you have testified?

A. Only to the degree that some of the sample plots which we took to base our estimated volume on and estimation of growth are based upon figures in this fringe area and they [277] were averaged with the others.

(Testimony of Dahl Y. Kirkpatrick.)

Q. You still came up with an allowable cut of twenty-one million and eighteen million one sixty-three, I think you said? A. That is right.

Mr. Romley: That is all, sir.

Mr. Moore: That is all.

The Court: Mr. Kirkpatrick, does this situation of Aztec owning every other section or alternate sections prevail throughout the Chevalon working circle?

The Witness: No, sir. There was a zone through the middle of the working circle where this prevails. It does not extend clear to the south end of the working circle. I have a map here if you would like to see the relation of the Aztec lands.

The Court: I would like to. Do counsel have any objection?

Mr. Moore: None at all, your Honor.

Mr. Romley: No, your Honor. Let me see if this large map has that and we could offer it in evidence.

May we have this marked for identification or directly in evidence?

The Witness: The area with the hatch lines is the Aztec lands.

Mr. Moore: We have no objection to it being marked [278] directly in evidence.

The Court: It will be marked as Plaintiffs' next in order.

(Testimony of Dahl Y. Kirkpatrick.)

(Plaintiffs' Exhibit 8 marked in evidence.)

The Court: Mr. Kirkpatrick, in the areas where that is true, where Aztec exists, does that result, as far as bidding on Forest Service timber is concerned, that the bids are practically limited to somebody who has Aztec next to it?

A. Not necessarily so. Before the National Forest timber and these alternate sections are offered for sale, we assure ourselves that rights of way across the Aztec lands could be secured by any purchaser; from a practical standpoint those points of the cutting rights of the Aztec lands has a definite advantage for anyone else from the standpoint of road construction.

The Court: Just the cutting, wouldn't his operation be much smoother?

The Witness: That is what I am trying to say, on account of the road development, as to development of the National Forest alone, the owner of Aztec has some notable advantages in operation.

The Court: Thank you.

(Witness excused.) [279]

DONALD A. BRUNELL

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Will you state your name, please, sir?

A. Donald A. Brunell, B-r-u-n-e-l-l.

Q. Where do you live, Mr. Brunell?

A. Phoenix, Arizona.

Q. How long have you lived in Arizona?

A. Approximately 14 years.

Q. And what is your business or profession, sir?

A. I am a certified public accountant.

Q. How long have you been a certified public accountant?

A. Nine years, since 1951.

Q. In what states are you admitted to practice?

A. Arizona only.

Q. Arizona only. Are you practicing alone or are you associated with any firm?

A. I am a member or rather a resident manager of the firm Peat, Marwick, Mitchell and Company.

Q. Is that one of the large national certified public accountant firms?

A. As a point of pride, yes. [280]

Q. You say you are the resident manager of that firm?

A. That's correct. Not the resident manager, a resident manager.

(Testimony of Donald A. Brunell.)

Q. I see. Does that firm maintain offices in other cities in Arizona?

A. We have a branch office in Kingman.

Q. And where is the home office?

A. I beg your pardon?

Q. Where is the home office?

A. The home office is New York City.

Q. How long have you been with that firm, sir?

A. Since July, 1958.

Q. Prior to that time, what was your association in the practice as a certified public accountant?

A. I was an associate of James A. Smith, CPA, practicing a sole practitioner.

Q. In Phoenix? A. Phoenix.

Q. With offices in Phoenix?

A. Yes, sir.

Q. And I believe it was the James A. Smith firm that merged, is that the right term?

A. Merged, that's correct.

Q. With Peat, Marwick and Mitchell firm?

A. That is correct. [281]

Q. How long were you with James A. Smith and Company?

A. From September, 1946, until the time of the merger, July 1st, 1958, nearly twelve years.

Q. I take it from all you have said that during part of your association with James A. Smith you were not a certified public accountant?

A. That's correct.

Q. You were with that firm when you received your certificate? A. That's correct.

(Testimony of Donald A. Brunell.)

Q. Mr. Brunell, are you acquainted with Mrs. George Nagel and Mr. Robert Jenkins?

A. I am.

Q. How long have you known them?

A. I have known Mrs. Nagel since, I would say December, 1952. Mr. Jenkins since he entered the business, I don't recall the date that he entered actively into the business.

Q. Have you ever had any business relationships with the firm of Nagel Lumber & Timber Company?

A. As professional accountants, yes, we have been engaged to do their work.

Q. Since what year?

A. We did a portion of 1952. If I may illucidate on this, Mr. Connolly, a CPA who resided in Holbrook had the account and he died in 1952 and we moved in in the Fall. We [282] were engaged in the Fall of '52, we were not there throughout the entire year.

Q. I see. And in what capacity were you engaged?

A. As independent public accountants.

Q. And have you or your firm with which you were then and now are associated been in engaged in the same capacity since that time?

A. We have.

Q. Has the work done in connection with that independent employment to which you refer been carried on by you or under your supervision?

A. I would say yes, in its entirety.

(Testimony of Donald A. Brunell.)

Q. In connection with that employment, did you have occasion to examine the books and records of the Nagel Lumber & Timber Company and then prepare statements or reports in connection therewith? A. I have.

Q. What was the purpose in making those examinations and reports?

A. At the outset we were engaged primarily to, you might say, recapitulate their financial information into statement form. Their accounting system at that time was, while adequate, was not as modern as it is at this time and we went in and actually, on a quarterly basis, made quarterly statements and brought them up to date. [283]

Secondary, or you might say a primary purpose was also to obtain the data to prepare income tax returns.

Q. And was that purpose accomplished or fulfilled as you went along? A. It was.

Q. You say these examinations were made quarterly, is that right, sir?

A. Well, they weren't examinations, we actually brought their bookkeeping up to date and made an annual statement at the end of the year.

Q. And were those annual statements then put in a more or less bound form and submitted to the Nagel Lumber & Timber Company?

A. That's correct.

(Testimony of Donald A. Brunell.)

Q. I hand you Exhibit 7-A marked for identification, sir.

Can you tell us what that is, please?

A. It's a report of examination of Nagel Lumber & Timber Company, a proprietorship, for the year ended December 31st, 1952, as prepared by or as submitted on the letterhead of James A. Smith, CPA.

Q. Was that prepared by you or under your supervision at that time? A. It was.

Q. When was that made up, sir?

A. The date of issuance was March 26th, 1953. That would [284] indicate the date on which the work was completed.

Q. I see. It had been in the process for some few weeks or months before that time?

A. Right, that's right.

Q. Does Exhibit 7-A—that is a photo only of the original, or copy—correctly and accurately reflect everything that is reported in the exhibit, sir?

A. (No answer.)

Q. With one possible exception that you may have in mind?

A. This particular report required a change in inventory, and in the subsequent year's report that change is brought forward and so reported in the comparative data. But we did not issue a corrected report.

Q. I see. Was the change that you have mentioned as having been brought forward in the suc-

(Testimony of Donald A. Brunell.)

ceeding year contained in Exhibit 7-B for identification?

A. Yes, sir, it's a change in the inventory and the exhibit 7-B correctly reflects the inventory.

Q. Now with reference, so I won't take too much time in identification and I will ask you a few general questions.

Can you tell us what exhibit 7-C, 7-D, E, F, G, H and I are, sir?

A. Exhibit 7-C is a report of examination for the year ended December 31st, 1954, as prepared by James A. Smith, CPA. I supervised this particular job, I did not—— [285]

Mr. Moore: Which one was that?

Mr. Romley: That's 7-C.

The Witness: 7-C, Mr. Moore.

Mr. Moore: For the year of——

The Witness: 1954.

Mr. Moore: Thank you.

Q. (By Mr. Romley): Does that exhibit correctly and accurately reflect the matters that are contained in the exhibit?

A. With this one exception: That we limit our opinion by the fact that we did not verify the inventory at December 31st, 1954, and accordingly could not give an unqualified opinion.

Q. I see. But is that report accurate to the best of your information and belief?

A. It is, it is correct.

(Testimony of Donald A. Brunell.)

Q. And with only that one exception that you did not verify, is that right?

A. That's correct; that's right.

Q. Now, will you tell us about Exhibit 7-D, please?

A. Exhibit 7-D is a report of examination of Nagel Lumber & Timber at December 31st, 1955, again made by James A. Smith, CPA. As my memory recalls we have the limitation of the scope of the audit by the fact that we were not able to observe the inventory at that time. [286]

Q. In other words, the same situation as prevails with reference to 7-C?

A. That's correct.

Q. With that exception then does the exhibit correctly reflect the matters and things that appear therein? A. It does.

Q. And to the best of your information and belief, even with regard to that one item, is it correct and accurate? A. That's correct.

Q. And what is 7-E?

A. 7-E, report of examination of Nagel Lumber & Timber as at December 31st, 1956, as prepared by James A. Smith, CPA.

Q. At each of these exhibits from 7-A through 7-E were prepared on the dates shown with the accompanying letter which I believe appears on the first page, is that right?

A. That's correct.

(Testimony of Donald A. Brunell.)

Q. Within a matter of just a few months after the end of the preceding calendar year?

A. That's correct.

Q. Well, now——

A. May I make one addition?

Q. Yes, sir.

A. In this case starting in 1956 as required by the loan indenture of the bank we gave an unqualified opinion on [287] the report, our examination was extended to where we gave an unqualified opinion.

Q. So that even the inventory exception no longer prevailed? A. Correct.

Q. And has that been true ever since that time?

A. It has.

Q. Does 7-D or that 7-E correctly reflect everything that's set forth there?

A. 7-E is correct.

Q. You have 7-F, do you?

A. 7-F is a report of George H. and Mabel J. Nagel doing business as Nagel Lumber & Timber as at September 30th, 1957, issued by the James A. Smith under date of March 29th, 1958. That reflects the status of the proprietorship at its termination just before going into a partnership.

Q. I see. And does this Exhibit 7-F correctly and accurately reflect everything that appears therein? A. That is correct.

Q. The reason for making this before the end of the year 1957 was that the sole proprietorship ceased to exist and the partnership was organized?

(Testimony of Donald A. Brunell.)

A. That's true.

Q. Now, what is 7-G?

A. 7-G is a report of examination of Nagel Lumber & Timber Company, a co-partnership as at December 31st, 1957, [288] issued under date of March 29th, 1958, for the period—this covers the period October 1st to December 31st, 1957.

Q. That's the first three months of the partnership operation, is that correct, sir?

A. That is correct.

Q. Does it likewise correctly and accurately reflect everything that appears in that instrument?

A. It does.

Q. 7-H?

A. 7-H is a change of terminology, "Accountants' Report, Nagel Lumber & Timber Company. Financial statement and supplementary data at December 31st, 1958, as prepared by Peat, Marwick, Mitchell & Company, certified public accountants," issued under date of March 5th, 1959.

Q. Does that similarly reflect and accurately reflect everything that appears within that instrument?

A. It does, merely a change of form in reporting.

Q. 7-I?

A. 7-I is a report, accountants' report on Nagel Lumber & Timber Company, a partnership, financial statement and supplementary data at Decem-

(Testimony of Donald A. Brunell.)

ber 31st, 1959, prepared by Peat, Marwick, Mitchell & Company, certified public accountants, and issued under date of February 6th, 1960.

Q. And again does that reflect and accurately reflect everything that appears therein? [289]

A. Yes.

Q. With reference to certain of these beginning with—is it '54 or '55—they are verified in all respects? A. '56 is the first year.

Q. Beginning with '56? A. Yes.

Q. Mr. Brunell, from this series of exhibits, 7-A through 7-I, can anyone by use of those exhibits ascertain therefrom the operating profits of the sole proprietorship during the time it was in existence and of the partnership since?

A. They can, yes, sir.

Q. And the sales made? A. Right.

Q. The profits realized? A. Correct.

Q. The quantities involved insofar as timber is concerned, net log scale, et cetera?

A. It can be obtained from the report.

Q. The depreciation charged, that's also obtained in these reports?

A. It's available, yes, sir.

Mr. Romley: If the Court please, I would like, before offering these, to say to the Court and for the record that copies of all of these have been provided counsel for the defendant for the past several weeks with the exception [290] of the 1952 and 1953 which were furnished this morning. Is that correct?

(Testimony of Donald A. Brunell.)

Mr. Moore: We do not have 1959, Mr. Romley. 1958 was the last one that you gave us.

Mr. Romley: I'm sorry, sir. I am in error, I guess. I will provide you with one. We offer 7-A through 7-I in evidence.

Mr. Moore: We object to this offer, if the Court please. First, evidence as to profits of the plaintiffs' operation, if that is the purpose of the offer, I don't think is material or relevant to any issue here. Second, again if there is any evidence in the record to establish liability upon which damages may be assessed, it is only the alleged violation of an agreement with respect to the purchase of an undivided one-half interest in real property, to-wit, the mill, and the standing timber.

The evidence of Mrs. Nagel specifically and explicitly excludes any possibility of there having been any understanding or agreement with reference to the operation of the business under any form of management or in any capacity.

And unless and until the plaintiff establishes the basis for assessing damages to be determined in accordance with the loss of future prospective profits, they must have some evidence at least of violation with an agreement with respect to the purchase of a going business and not an [291] agreement merely to buy real estate.

I believe that covers the grounds that I have in my—

(Testimony of Donald A. Brunell.)

The Court: They will be received. Of course in the event that the Court determines that there is no basis for recovery of this loss of profits, then they will be disregarded because they are——

Mr. Moore: So the record will be clear, your Honor, and I will not be interrupting the Court, counsel or the witness, I would like to have it understood that there will be a continuing objection to any and all evidence with respect to future profits.

The Court: The record may show that continuing objection.

(Plaintiffs' Exhibits 7-A through 7-I received in evidence.)

Mr. Moore: There is one other thing I overlooked that I think I should mention in the objection, your Honor, and that is some of them are too remote, 1952.

The Court: Well, that might go to their weight, Mr. Moore, in the event they are considered. They go back as far as '52, that would be taken into account in considering their weight if the Court finds that there is any right to recover for loss of profits.

(Plaintiffs' Exhibits 9 and 10 marked for identification.) [292]

Mr. Romley: Mr. Moore, if you wish I'd be happy to give you a copy of Plaintiffs' 9 and of Plaintiffs' 10.

Mr. Moore: Which is this, Mr. Romley?

Mr. Romley: That is 9.

(Testimony of Donald A. Brunell.)

Q. (By Mr. Romley): Mr. Brunell, I hand you a document marked Plaintiffs' 9 for identification, which in the lower left-hand corner of the face thereof is designated as Schedule A.

Will you please tell us what that is, sir?

A. Schedule of available timber at date of sale, November 6th, 1958.

Q. Can you tell us, sir, who prepared or under whose supervision that exhibit was prepared?

A. I don't know under whose supervision it was prepared but my final check of the accuracy was the basis for it being presented here.

Q. Can you explain and tell us what that exhibit is, sir?

A. In effect it sets forth the various sources of timber: Duke City Aztec, Gallagher Aztec and Forest Service, set forth as net log scale. And then a net lumber recovery of 115 percent of net log scale or an overrun of 15 percent. We have a total net lumber recovery set forth here of 266,565,000 from our various sources, the Duke City-Aztec source to be cut under milling contract, 44,055,000 board feet; with the overrun or the net lumber recovery of 50,663,000 board feet.

Mr. Moore: Your Honor, I am just a little at a loss [293] with this because we were—if you will pardon me, Mr. Brunell—

The Witness: Certainly.

Mr. Moore: Mr. Brunell is in effect reading into the record as evidence a source of timber of 44,-

(Testimony of Donald A. Brunell.)

000,000 feet to be cut under milling contract. I assume that that refers to the milling contract between Duke City and Gallagher.

Now certainly there is no evidence upon which to base any admission of evidence here with respect to what might have been cut under that milling contract.

Mr. Romley: I think——

Mr. Moore: The contract in evidence shows that was terminated. The purchase contract, November 6th, 1958.

Furthermore this contains other matters with respect to 18,450,000 feet owed by Duke City.

The Court: Well, your objection really is that it's not proper for him to read into the record from something that is not admitted in evidence?

Mr. Moore: Well, that and——

Mr. Romley: That objection to that extent is good, your Honor, and I will ask that the witness not read it.

I think that perhaps he went further than I intended or contemplated. It's manifest, your Honor, that I can't get all the evidence at one time. I would like to develop a few things here, lay a part of the foundation and then I will offer it [294] later.

Q. (By Mr. Romley): I will ask you, sir, if you have shown on this Exhibit 9, is it, Schedule A? A. Yes, sir.

Q. The net log scale with regard to the items there appearing? A. Yes, it's shown.

(Testimony of Donald A. Brunell.)

Q. And you have another item net lumber recovery? A. That's correct.

Q. Now, can you tell me what the relationship is percentage-wise between the net log scale and the net lumber recovery in each instance?

A. In each instance we have what is considered a 15 percent overrun, or the net log scale is 100 percent, the net lumber recovery is 115 percent.

Q. In other words, the second column, the net lumber recovery is 15 percent greater than the first column, net log scale, is that right?

A. Correct, that is correct.

Q. And you computed that and found it to be correct, did you? A. I did.

Q. And is it exact or did you round it out in odd thousands?

A. It's rounded to the nearest thousand, there is nothing under a thousand carried. [295]

Q. I will hand you, sir, an exhibit marked Plaintiffs' 10 and in the lower left entitled Schedule D.

Without detailing its contents or figures, can you tell us what the exhibit is, sir?

A. It's an exhibit of operating profits of Nagel mill before deducting depreciation. We have the years 1952 through 1959, net sales FBM through the same period, the profit amounts before depreciation and an average per thousand with a weighted average for the period of years.

(Testimony of Donald A. Brunell.)

Q. When you speak of net sales FBM, will you tell us what that column indicates?

A. That indicates the net sales, foot board measure, of lumber sold, and those figures that are shown that are from the reports as prepared either by James A. Smith, CPA, or Peat, Marwick, Mitchell, the footage shown as sold rounded to the nearest one thousand.

The Court: Where did you get these figures?

The Witness: These figures?

The Court: Yes.

A. From the records of the company, they are in our reports.

Mr. Romley: Are they in 7-A to I?

The Court: Are they in this 7 series?

A. Yes, sir, they are in the 7 series.

Q. (By Mr. Romley): In other words, this is a summary of [296] something that's in the 7 series?

A. It is, yes, a brief summary of figures that are in there.

Q. The first column is the year involved, the second column you have told me represents the sales in board feet sold? A. Correct.

Q. The third column is the amount of operating profit, is that right?

A. It's the amount of operating profit of Nagel mill before deducting the depreciation with this one provision: That in determining the operating profit partners' salaries were eliminated from the

(Testimony of Donald A. Brunell.)

figure and a per annum figure of \$27,000 was substituted, management fee. That is the only adjustment to figures recognized in our report.

Q. In the 7 series? A. The 7 series.

Q. And that exception commenced as of October 1st? A. As of October 1st.

Q. 1957? A. 1957, that's correct.

Q. And the last column on the right, the average per M is the average per thousand board feet, I take it, arrived at from the other figures appearing on it, is that right, sir?

A. That's correct, that's correct, that is the average [297] for the year.

Q. And then you show the weighted average of the operating profit of the Nagel mill before depreciation per thousand board feet, is that right, sir? A. That's correct.

Q. You computed that?

A. I did.

Q. And is it accurate? A. It is.

Q. Are all the figures shown on Exhibit 10 accurate?

A. I have proofed them all by calculator and they are, to the best of my knowledge, accurate.

Q. And is the same true with reference to Exhibit 9 that you just had a while ago?

A. That's correct.

Mr. Romley: If the Court pleases, I would like to take these in their order, and two of them have to be assembled, scotch taped together. If we could have a short recess I can do it here in about five

(Testimony of Donald A. Brunell.)

minutes. I didn't have an opportunity during the noon recess to put them together, they were still in the process of being proofed and finished.

The Court: Well, we will recess for about five minutes.

(Short recess.) [298]

(Plaintiffs' Exhibits 11, 12 and 13 marked for identification.)

Q. Mr. Brunell, I hand you a document marked Exhibit 11 for identification and on the lower left of which is written Schedule C. Will you tell us what that is, sir?

A. This is a depreciation schedule, footnote, based on Duke City allocation of the \$650,000 purchase price with the breakdown between the various facilities.

Mr. Romley: I think this is as good a time as any to see if we can agree with respect to these various figures. You have a copy of 11, do you, which is Schedule C? Could we agree as follows: That of the properties purchased by Duke City from Gallagher, Duke City shows on its books for depreciation the sawmill at a value of \$176,970 and shows its residual value is fifteen per cent, may we so stipulate?

Mr. Moore: Fifteen per cent salvage value?

Mr. Romley: Yes.

Mr. Moore: That is correct.

The Court: What do you mean by that, at the end of its life—

(Testimony of Donald A. Brunell.)

Mr. Romley: At the end of its life it would have a residual of salvage value at fifteen per cent.

Mr. Moore: In other words, they are depreciating eighty-five per cent of it on a unit basis. This will show when we get to it. [299]

Mr. Romley: With respect to the planing mill acquired by Duke City from Gallagher, it appears on the books of Duke City \$127,240, showing similar salvage value.

Mr. Moore: That is correct.

Mr. Romley: And the shop, \$18,780 with the same salvage value.

Mr. Moore: That is correct.

Mr. Romley: The lumber shed, \$12,670 with the same salvage?

Mr. Moore: That is right.

Mr. Romley: Dry kiln \$56,470 with the same salvage.

Mr. Moore: That is right.

Mr. Romley: With respect to the office building and equipment I believe what you show was that you did not break that down but showed its total to be \$3480 and salvage of fifteen per cent, is that right?

Mr. Moore: That is right.

Mr. Romley: There is a copy of that on your Honor's desk.

Mr. Moore: The exhibit you have has different figures on it. I do not stipulate to those.

(Testimony of Donald A. Brunell.)

Mr. Romley: You stipulate only that Duke City shows on its books the office building and equipment purchased from Gallagher to be in the total of \$3480 with fifteen per cent salvage, is that correct? [300]

Mr. Moore: That is correct.

Mr. Romley: With regard to the bunkhouse, \$4540 with fifteen per cent salvage value.

Mr. Moore: That is right.

Mr. Romley: With regard to carriers and lift trucks, \$59,550 with five per cent salvage?

Mr. Moore: That is correct.

Mr. Romley: Stacking sticks, foundation spacers and roof boards, 80,000 with no salvage value.

Mr. Moore: That is right.

Mr. Romley: The camp, \$5,000, fifteen per cent salvage.

Mr. Moore: That is right.

Mr. Romley: The trucks, trailers, auto patrol and Ford pickup, \$97,500 with five per cent salvage.

Mr. Moore: That is correct.

Mr. Romley: And the land at \$7800 non-depreciable.

Mr. Moore: That is right.

Mr. Romley: The total being as shown on the column on the right, \$650,000.

With regard to Exhibit 11, Schedule C, did you check with a calculator to see if the totals shown across the page below the first line are correct and accurate? A. I did.

(Testimony of Donald A. Brunell.)

Q. Are they? [301] A. They are.

Q. Did you compute the percentages and show them in the opposite column indicated salvage?

A. I did.

Q. For example, under the total of \$304,410 you took fifteen per cent salvage and showed that as \$60,511.50 below? A. Right.

Q. And the same applies across?

A. That is right.

Q. With the differing amounts?

A. That is right.

Q. Those are correct? A. That is correct.

Q. The next item below salvage, net depreciable balance. Does that sum shown in each column represent the difference between the totals after subtracting the salvage? A. It does.

Q. Are those sums correctly reflected?

A. They are correct.

Q. With reference to the total, the column shown as total depreciable investment \$874,928, can you tell us what that is? Is that the sum total of the 573,575 plus the 156,076 twice?

A. That is correct.

Q. Will you tell us what the next item indicates, the one below the second line, depreciation spread over total [302] projected production of 266,565—

Mr. Romley: 266 million.

Mr. Moore: 266,565,000.

(Testimony of Donald A. Brunell.)

Mr. Romley: 266,565,000.

A. The depreciation spread over the total production of 266,565,000 is on a unit method of depreciation, consists of depreciation of 874,928 being spread over that number of board feet.

Q. (By Mr. Romley): And that would come only to the \$3.28 per thousand, is that correct?

A. That is right.

Q. Mr. Brunell, in your work as a Certified Public Accountant, have you had occasion to acquaint yourself with depreciation on various items, for all practical purposes?

A. I guess, in all fields of industry.

Q. In all fields of industry, including the lumber industry?

A. My only experience with the lumber industry is with the Nagel Lumber & Timber.

Q. Do you have an opinion as to whether the sawmill, as to the time within which the Duke City sawmill could be depreciated, either by years or by board foot production?

Mr. Moore: We object unless the foundation is laid upon what theory or rule he is testifying as to upon what it could be based. On what basis it could be depreciated, what [303] purpose. I think the foundation has to be laid, your Honor.

Q. (By Mr. Romley): Perhaps I can get at it this way. In connection with your work, Mr. Brunell, have you had occasion in the past to consider and determine the proper periods of depreciation for various items of equipment?

(Testimony of Donald A. Brunell.)

Mr. Moore: I object to the use of the words "proper periods." According to what tests or what rule of law or whatever we are going by here.

The Court: Of course he is in the accounting field. I assume it would be for the purposes of accounting, his experience in setting up depreciation schedules or establishing methods.

Mr. Moore: I object unless, your Honor, we do have a proper foundation so that we know upon what basis Mr. Brunell is expressing his opinion, just your experience with a proper basis of doing it, I would like to have the foundation laid before the answer is given.

The Court: He can answer this yes or no and then I suppose we will get into what his experience has been, in what field and what experience he has had in it.

(The last question was read.)

A. Yes.

Q. (By Mr. Romley): Have you in connection with that experience had any dealings with items such as a sawmill? A. No. [304]

Q. A planing mill?

A. No. The depreciation rates on the Nagel Lumber and Timber were established before I came in.

Q. You made no attempt to establish or re-establish them? A. That is correct.

Q. All right. Directing your attention to Exhibit 12, which is Schedule D, can you tell us what that is, sir?

(Testimony of Donald A. Brunell.)

A. A schedule of the projected profit from available timber, based on the availability of the Duke City Aztec timber and the balance of available timber, projected at varying rates which have been derived. I have checked these figures and find them correct and accurate.

Q. That is what I am getting to. The first figure under Duke City, \$3 times the fifty million six hundred sixty-three thousand is correctly carried forward? A. Correct.

Q. And the next figure? A. Yes.

Q. All of the figures are correctly carried forward?

A. Let me say that they are all arithmetically correct.

Q. All arithmetically correct. All right, sir.

On Exhibit 12, Schedule D, here is the notation: Average minimum profit before depreciation \$11.29. That is per thousand, is it? [305]

A. That is correct.

Q. And was that taken from Exhibit 10, Schedule B? A. That is right.

Q. I think the rest of 12 is self-explanatory. I hand you Schedule E, Exhibit 13, sir. Will you tell us what that is?

A. This is the production of available timber by years from the year 1959 through 1973.

Q. Now, in the first column you have the year and the second column, what does that purport to be?

(Testimony of Donald A. Brunell.)

A. That purports to be the source.

Q. Source of the timber?

A. Source of the timber.

Q. The third column appears to be, insofar as the first few items are concerned, the total of the fourth column, is that right? In other words, the 30,000 is the total of the two figures?

A. That is correct. The figures on the right are a breakdown of the figure to the center.

Q. Normally they would be shown the other way but the purpose is try to keep the figures together?

A. That is right.

Q. This shows the same total gross production of 266 million five hundred sixty-five?

A. Correct. [306]

Q. That total is arithmetically correct?

A. That is arithmetically correct.

Q. With regard to the right half of that page, the first column entitled: Fifty per cent of projected profit by years. Will you tell us what that is, sir, how those figures were arrived at?

A. The figures were derived by applying, in the case of Duke City Aztec, the resources of Duke City Aztec \$7.33 per thousand and dividing by two, coming up with fifty per cent of the profit.

Q. In other words, by way of illustration, you take the Duke City Aztec in '59, 15 million three hundred twenty dollars, we multiply that by \$7.33 per thousand, divide by two and come up with 56,147.80, is that right, sir?

(Testimony of Donald A. Brunell.)

A. That is right.

Q. The figure below that?

A. Derived as under your footnoting of \$8.01 per thousand on all other timber, so it would be your fourteen million six eighty times \$8.01 per thousand divided by two, giving you your 58,792.40.

Q. Arithmetically are the figures to the left of the column headed fifty per cent of projected profit by years arithmetically correct?

A. Arithmetically correct.

Q. The figures to the right of that same column [307] arithmetically correct? A. They are.

Q. In all respects? A. In all respects.

Q. Arrived at in the same manner?

A. Right.

Q. And the total is arithmetically correct, is that right? A. That is right.

Q. Now, in the next column. It is entitled: Present value of one dollar due the years hence shown in parenthesis. Tell us exactly what that is, sir.

A. Those are present values of one dollar at four per cent as taken from your table of present values in the Arizona Code Annotated. They are taken directly from the table and applied to the years. The one dollar of course does not apply.

Q. By that you mean it does not apply there because that year is behind us?

A. Correct. The other percentages I personally checked against the table, I know they are correctly transcribed. [308]

(Testimony of Donald A. Brunell.)

Q. And by way of illustration then, the second figure in that column, .961538 is the present value of one dollar one year from now, is that right?

A. Correct.

Q. And so on down?

A. So on down the line.

Q. Those figures are correct as taken from the table?

A. They are.

Q. Then the final column on the right of Exhibit 13, Schedule E, is entitled "Present Value of 50 percent of the Projected Profits."

Perhaps this is a leading question, but I think we will save time. Is that arrived at by multiplying the projected profits by the figures shown in the present value column?

A. That's correct.

Q. And did you check each of those items?

A. I did check them.

Q. Are they correct and accurate arithmetically?

A. They are correct and accurate.

Q. Did you do it yourself or by calculator?

A. Well, I did it by calculator about four times.

Q. All right, sir. And is the total then reflected in the bottom of that column correct?

A. It is. [309]

Q. That's \$867,773.68, is that right?

A. That's right.

Q. That, I take it, is the present value of the \$1,050,367.41 shown in the other column?

(Testimony of Donald A. Brunell.)

A. That is by applying these factors.

Mr. Romley: You may cross examine.

Mr. Moore: Are you going to offer these now or later?

Mr. Romley: I'm going to offer them later, I think some further foundation is necessary.

Mr. Moore: I wanted the opportunity to study them before time to object expires. There are a few questions that I could ask Mr. Brunell now, your Honor, but I would like the privilege of having an opportunity to have some of these exhibits checked against various records and analyzed before I complete my cross examination of them.

The Court: Very well.

Cross Examination

Q. (By Mr. Moore): Mr. Brunell, did I understand you correctly that on the exhibits 7-A to 7-I, those are those annual reports?

A. Yes, sir.

Q. Now, the first pair of them at least you did not prepare, is that correct? [310]

A. I was, Mr. Moore, I was either actively engaged in the audit or in supervisory capacity in all years.

Q. All of the years? A. Yes.

Q. So that each of them was prepared either by you or under your supervision?

A. Correct.

(Testimony of Donald A. Brunell.)

Q. Now, are you certifying that those are correct as a certified public accountant?

A. Not beyond the years of—prior to the years of 1956.

Q. Prior to '56?

A. When I say an unqualified opinion, it is a layman's expression of a certified report.

Q. And prior to '56 you do not certify them?

A. No, we did not.

Q. And in '56 did you verify the inventory at the beginning of the year and also at the end of the year or just at the end of the year?

A. We verified it only at the end of the year.

Q. You had no check at all on it as of the beginning of that year? A. As I recall, no.

Q. And then in the subsequent years, Mr. Brunell, I would assume that you relied upon the inventory check that appeared in your prior reports as the beginning? [311]

A. Yes.

Q. And then check it at the end of the period?

A. That's correct.

Q. Now on this Plaintiffs' Exhibit 9, it might be well if he had a copy of those. Do you have them there, Mr. Brunell, or you can look at them.

Where did you get the information set forth in the net log—under net log scale opposite 1A?

A. I did not prepare this exhibit. I merely checked the accuracy.

Q. Do you know where that information came from? A. I do not.

(Testimony of Donald A. Brunell.)

Q. Did you say you did not?

A. I did not prepare the exhibit, I merely checked the accuracy of it.

Q. Oh, I see. You merely checked the accuracy and——

A. That's right.

Q. ——multiplication if there is any in it?

A. That's correct.

Q. But the information contained therein you know nothing about yourself?

A. That's correct.

Q. Now, number 10, did you prepare number 10?

A. Yes. Let me say I was in on the preparation of it. It was polished somewhat, but I did dig up the basic information [312] for it.

Mr. Romley: Will you speak a little louder, I'm having a little trouble hearing you.

The Witness: Surely.

Q. (By Mr. Moore): Did I understand you, Mr. Brunell, that the figures set forth there were taken from the exhibits 7-A to 7-I, or whatever that is, those annual reports?

A. This is the manner in which we worked, Mr. Moore. We took the net operating profit per the report and added back the depreciation to show profit before depreciation. There was one exception to that.

In the years '57, '58 and '59 partners drew salaries which were eliminated from the operating deductions and a \$27,000 per annum management fee was substituted therein.

(Testimony of Donald A. Brunell.)

Q. In this exhibit that was done?

A. In that exhibit, correct.

Q. Well, where did this figure net sales FBM come from, where did you get those figures?

A. That was from our report, sir.

Q. That's from the report?

A. Yes, sir, rounded to the nearest one thousand feet.

Q. And under the column "Amount," were those figures taken from the report?

A. They are derived from the report.

Q. They are calculated from the figure from the report? [313]

A. Calculated from the report's figure.

Q. With reference to the column "Average per M," you mean average per thousand board feet I assume?

A. That's correct.

Q. In determining that figure you excluded depreciation from the reports or included it?

A. Excluded from this report.

Q. Excluded. And from '56 on or '57 on, you reduced the salaries that were drawn or drawings that were drawn by the partners?

A. That's correct.

Q. That commenced what year that you did that?

A. For one quarter of '57 and two full years of '58.

Q. And '59?

A. That is two full years, '58 and '59.

(Testimony of Donald A. Brunell.)

Q. You substituted in lieu of what the report actually showed an arbitrary figure—and by “arbitrary” I mean you or someone just set that figure?

A. I would prefer assumed.

Q. As a management fee?

A. It was an assumed figure as a management fee.

Q. Maybe that’s a better word than arbitrary figure.

A. I would prefer it.

Q. As a management fee?

A. Correct. [314]

Q. How did you arrive at that assumed figure?

A. Well, let me say that I didn’t arrive at it by myself, but in discussion with Mr. Jenkins and Mr. Romley we determined that probably adequate management could be had for that salary. As a matter of experience I think Nagels had adequate management for a salary somewhat less than that.

Q. But that particular year you reduced what they had drawn in salaries and substituted a management fee, didn’t you?

A. That’s correct.

Q. Is Mr. Romley an expert in this field that he gave you that advice?

A. Mr. Romley is the attorney, that’s all I can say.

Q. Well, did the information from which that assumed figure was determined primarily come from Mr. Romley or from Mr. Jenkins or from you or equally?

A. I would say that it was probably a combined opinion of Mr. Jenkins and myself.

(Testimony of Donald A. Brunell.)

Q. I see. What did Mr. Romley have to do with fixing it?

A. Right offhand I don't recall that he had too much to do with it.

Q. Well, for example on 1957 you show average per thousand profit of one dollar fifty-five and nine-tenths cents?

A. That's a result of the fire that was [315] mentioned.

Q. Whereas isn't it a fact that their report for 1957 shows a substantial loss of some fifty or seventy thousand dollars?

A. That is correct.

Mr. Romley: I object to the form of the question, I think the report shows \$33,000 loss.

Mr. Moore: Well, there are two different figures in it, I believe.

The Court: He may answer.

Mr. Moore: Maybe it would be better to look.

The Court: I believe there are two for the year 1957.

Mr. Moore: Thank you, your Honor. I actually want the one at the end of the year.

Q. (By Mr. Moore): Pardon me, Mr. Brunell, if I may step up here beside you and help you hold this. Now we are looking at the report for the period ending September 30th, 1957, correct?

A. Correct.

(Testimony of Donald A. Brunell.)

Q. What net loss does that show?

A. It shows a net operating loss of \$6,446.45.

Q. And what is the figure at the——

A. At the extreme bottom is net loss after other income and expense of \$20,682.08. We have been talking operating loss.

Q. Is there any change from that one and the one for the [316] period ending December 31st, 1957, with respect to the net operating loss?

A. We show an operating loss for that period, a net operating loss prior to other income and expense of \$30,991.47.

Q. Now, is that for the year, the last report or just the——

A. That's just for the three months.

Q. Is that just for the three months?

A. That's correct. So you must combine the two figures to get the total loss.

Q. And you can add them, the total of those two figures for the net operating loss or whatever you call it for that year is what?

A. About \$36,000. It will run to 37,000.

Q. Now, that's the operating loss you are talking about?

A. That's the operating loss, that's correct.

Q. What is this loss at the bottom of the page, net loss for the period?

A. That is the loss for the business of the period after having collected other items of income in the form of rental, discounts, interest, and after

(Testimony of Donald A. Brunell.)

having paid their interest on indebtedness, bad debts and losses on sale of assets. This is what we consider a pure operating figure.

Q. Yes. But the similar figure in the Exhibit 7-G for the net loss for the period is \$33,128.81? [317]

A. That's correct.

Q. And for the last three months of that year?

A. Last three months of that year, that's correct.

Q. In the determination of the profit that you calculated on Exhibit 10, did you make any allowance for interest on operating capital?

A. No, there is no allowance for interest in that.

The Court: May I ask something, Mr. Moore, while we are on it here?

Mr. Moore: Yes.

The Court: What do you mean by this "weighted average"?

A. That is the average, sir, by dividing the total of the profits for the period of years by the total footage sales for the year. In other words, for the period, it gives an average for the period.

Q. Well, it's an average rather than a weighted average?

A. Well, yes, it is. But if you took an average of the averages that you arrived there it wouldn't be a desirable figure. It is still an average.

The Court: I see.

Q. (By Mr. Moore): With reference to Exhibit 11, Mr. Brunell, that's the depreciation schedule?

(Testimony of Donald A. Brunell.)

A. Well, it has the elements of a depreciation schedule.

Q. What do your figures at the bottom, two replacements, [318] one at the end of three years and one at the end of nine years, to what are you referring there?

A. That's considering that your mobile equipment will have to be replaced at the end of three years and at the end of nine years you will have that cost in there again, and the depreciation available showing a total available depreciation.

That's an assumed figure, not an arbitrary figure.

Q. And the assumed conclusion from the two is in the final column, is that right, the one hundred fifty?

A. Yes, that's the total of the—well, the provision for replacement of a portion of the office building and equipment.

Q. And also it is an assumed figure that that should be depreciated over a period of operation of thirteen years, isn't that correct?

A. That is the assumption. It is assumed that it will be depreciated over a production of 266,000,000.

Q. Well, if the capacity, say, is 22,000,000 feet as Mr. Jenkins says Nagels was, that would be thirteen years approximately, wouldn't it?

A. That's right, that's correct. [319]

Q. And at the end of thirteen years I assume in that assumed figure everything is worn out?

A. Not knowing the age and condition of the material before they started I wouldn't know.

(Testimony of Donald A. Brunell.)

Q. Now likewise on Exhibit 13, Mr. Brunell, did you prepare this schedule from information furnished to you or did you get the information and prepare this?

A. I did not prepare this schedule.

Q. You did not prepare this?

A. The schedule was prepared and submitted to me for proof and checking. I checked it back against the other source documents that we have available here, all of this information is—with the exception of this present value data is in other exhibits.

Q. Who did prepare this exhibit, do you know? I'm referring to the Plaintiffs' Exhibit 13?

A. I think the accountant for Nagel Lumber could have prepared it.

Q. Mr. Nelson? A. Mr. Nelson.

Mr. Moore: Your Honor, that's all of the questions I have from Mr. Brunell at this time but I would like to have the privilege of having these exhibits analyzed and it may well be that I would like to ask Mr. Brunell some additional questions in the morning. [320]

The Court: Very well.

Redirect Examination

Q. (By Mr. Romley): Just one thing here briefly. I believe it is your testimony that insofar as the reports or statements for the years prior to 1956, '52 through '55, that you did not certify them?

A. That is correct.

(Testimony of Donald A. Brunell.)

Q. And did not check the inventories at the beginning and end of the year but checked them at the end of the year only, is that—

A. We checked them at the end of the year of 1956.

Q. Of the year 1956?

A. Yes, and reported on the financial condition of the company as of that date.

Q. And notwithstanding the fact that you did—well, I think you testified on direct examination why you didn't certify the earlier ones.

Did you prepare the income tax returns for the Nagel Lumber & Timber Company for all of these years, '52 through '59? A. We did.

Q. Was income reported on the basis of each of these exhibits 7— [321]

Mr. Moore: We object to that.

Mr. Romley: Just a minute, let me ask the question.

Mr. Moore: Excuse me, I didn't mean to interrupt you. I apologize.

Q. (By Mr. Romley): You have said that you prepared the income tax returns for the Nagel Lumber & Timber Company for each of the years '52 through '59. I believe that's correct. Did those returns reflect the same income that is shown in these exhibits?

Mr. Moore: We object to that as immaterial.

Mr. Romley: A to I inclusive.

The Court: The objection is sustained.

(Testimony of Donald A. Brunell.)

Q. (By Mr. Romley): On the basis of the information available to you as a result of your examination of records, et cetera, did you arrive at an opinion as to whether the income of the Nagel Lumber & Timber Company was as reflected in Exhibits 7-A to 7-I, inclusive?

A. Yes, it's as reflected, that's their income.

Q. That's their income, that is your opinion, sir?

A. That is my opinion.

Q. The year 1957 as shown in Exhibit 10 is the poorest of the years from the standpoint of income and average profit, is that right, sir?

A. That's correct.

Q. And I think you told Mr. Moore that was because of the [322] fire that has been testified to in this case?

A. That's right.

Q. You told him also that you, in connection with or in conjunction with Mr. Robert Jenkins, finally arrived at a management figure of \$27,000?

A. That's correct.

Q. And that I was—took some part in it?

A. I think you were present, I'll say that much.

Q. I see. Do you recall—strike that, please.

Can you tell us just how that figure of \$27,000 was arrived at?

A. No, other than it was compared with what was assumed to be approximate salaries drawn by others in the industry. I don't recall any names, but there were individuals mentioned drawing salaries and it was assumed on that basis. But no particular individual, it was arrived at—

(Testimony of Donald A. Brunell.)

Q. You said there was some check to the records of the Nagel Lumber Company, do you remember whose in particular you checked, what manager's salary in the company had been checked?

A. No, I don't recall.

Q. Do you remember a Mr. Brown?

A. Yes, I recall Mr. Brown.

Q. Do you remember what capacity he was engaged in? A. He was general manager.

Q. I see. Do you remember what his salary was? [323]

Mr. Moore: I think that's too remote and we object to it, if your Honor please. Mr. Brown, I don't remember the evidence but he terminated his employment there some few years back. And furthermore it is my recollection that Mr. Brown was an assistant manager under Mrs. Nagel. He is talking now about a manager's salary and manager's fees.

The Court: Well, he may tell how he did it, what it's worth is something else again. I mean for the purpose of——

Mr. Moore: I wasn't objecting, your Honor, as to the manner in which he did it, I was objecting to evidence as to what Mr. Brown's salary may have been in 1952 or '54 or whatever period of time that was.

The Court: Well, as far as that is concerned, it would be immaterial except if it were a fact that they used that salary. It may be put in as a fact.

(Testimony of Donald A. Brunell.)

Mr. Romley: I think first we should inquire if he remembers what Mr. Brown's salary was. If not——

The Witness: No.

Mr. Romley: ——I can ask another question.

A. I don't know.

Q. (By Mr. Romley): All right, sir. Mr. Brunell, what were these—first we are dealing here now with a partnership, are we not?

A. That's correct. [324]

Q. And did the records and do the records of the partnership reflect withdrawals by partners?

A. Yes.

Q. In strict accounting do partners as such draw salaries?

A. My honest opinion is that a partner is not entitled to a salary.

Q. He is entitled to a share of the income?

A. Share of the income.

Q. And were these items that were deducted in the preparation of this Exhibit 10 items that represented withdrawals by the partners that were charged as partners' salaries?

A. That's correct.

Mr. Romley: That is all.

Mr. Moore: We will reserve our examination.

The Court: Very well.

Mr. Romley: May we have just a moment, your Honor.

Mr. Jenkins, would you resume the stand, please.

ROBERT T. JENKINS

recalled as a witness herein, having been previously duly sworn, testified further as follows: [325]

Redirect Examination

Q. (By Mr. Romley): Mr. Jenkins, have you heard the testimony of Mr. Donald Brunell who just testified? A. Yes, sir.

Q. Directing your attention first to the item of partners' salaries, and the figure of \$27,000 assumed and allocated in this Exhibit 10 for identification, do you recall the discussion that took place in connection with that? A. Yes, sir.

Q. Do you recall the amount of the partnership withdrawals during the years '58 and '59?

Mr. Moore: Those are in the record, aren't they?

Mr. Romley: Yes.

Mr. Moore: Well, that's the best evidence. If he wants to look at it——

Mr. Romley: Well, this is only for the purpose of explaining how this was arrived at.

Mr. Moore: Very well, I will not object. I was just commenting that they are in the record.

Q. (By Mr. Romley): Just approximate amounts only?

A. Yes, sir, approximate figures.

Q. Do you remember what partners of the five made withdrawals during those years that were charged as partners' salaries? [326]

A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. Who were they?

A. Mrs. Nagel and myself, I believe.

Q. Do you recall the amount withdrawn by each?

A. The approximate amount?

Q. That's all I expect from you, sir.

A. Yes, sir.

Q. What was that?

A. Approximately \$30,000 for Mrs. Nagel and \$15,000 for myself.

Q. I see. Now, did the firm at one time—I don't mean the partnership now, but I mean the Nagel Lumber & Timber Company—have in its employ a man by the name of Brown?

A. As a general manager, yes, sir.

Q. Do you know during what years he was employed?

A. I believe 1950 or '51 through the summer of 1955.

Q. What was his full name?

A. George M. Brown.

Q. Do you recall the salary he was paid?

Mr. Moore: We object to that, that would appear in the records, wouldn't it? That would appear in these accounts?

Mr. Romley: I don't believe that it would appear because it would have been charged as an item of expense. I am not sure, but I can look and see. [327]

Q. (By Mr. Romley): Take the year of '54 here, Bob. Will you take a look at the exhibit which is 7-D, or 7-E?

(Testimony of Robert T. Jenkins.)

A. Your question, sir?

Q. Is that 7-D or 7-E? A. 7-C.

Q. 7-C? A. Yes, sir.

Q. Does that show the amount of salary paid to a general manager in that year, Mr. Brown?

A. It shows an arbitrary figure of salaries.

Q. What do you mean arbitrary figure?

A. Well, it's—could be accumulated salaries of three or four persons in this one figure.

Q. You don't mean arbitrary, do you, Bob? You mean a cumulative figure?

A. Yes, it has the stated figure but the category that it's placed under is general expense, and that is the only salaries.

Q. Is the salary of George—was it George Brown? A. George Brown, yes, sir.

Q. Of George Brown included in that category?

A. No, sir.

Q. Where is it included?

A. It's included under saw mill, schedule of costs.

Q. Manager's salary? [328]

A. Manager's salary, yes, sir.

Mr. Romley: That's in the 1954 report on page 12, Mr. Moore.

Q. (By Mr. Romley): That is in the sum of \$15,000, is that right? A. Yes, sir.

Q. That was the salary paid him?

A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. Now, do you have any—if we were to exclude the partners from the operation of the business and were to employ someone else to manage the business, do you have any opinion—and please just answer yes or no without stating any amount, if you have such an opinion—as to what the reasonable, or what—at what salary such a person could be employed? A. Yes, sir.

Q. On what do you base that opinion?

A. On the records of wages that are in my file in my office in Winslow that are paid throughout the industry.

Q. Paid throughout the industry?

A. Yes, sir.

Q. Lumber industry?

A. Yes, sir, various plants.

Q. Is that for management salaries?

A. For management classification salaries, yes, sir. [329]

Q. Can you tell us what in your opinion would be a sum for which you could employ management if the partners were not in the business?

Mr. Moore: We object, your Honor, because the witness states he based his opinion upon records which are in his office in Winslow. The records would be the best evidence.

The Court: No, he may answer.

A. We arrived at this figure of \$27,000 by taking what is a known general manager's salary within, plus or minus of three or four thousand dollars,

(Testimony of Robert T. Jenkins.)

plus an assistant manager or sales personnel salary figure within the same range added the two together.

Q. (By Mr. Romley): This \$27,000 assumed figure that Mr. Brunell testified to represents the salary of these two men you have referred to?

A. Yes, sir.

Q. That figure was arrived at on the basis of your knowledge and information and with regard to what was being done in the industry generally?

A. What is being paid to certain individuals in the industry, yes, sir.

Q. In your opinion could you obtain efficient management for that?

A. Yes, sir. [330]

The Court: Mr. Romley, what has Brown got to do with this?

Mr. Romley: Only this, if your Honor please, Brown is no longer in the company and hasn't been for sometime. Here we have two partners that have been withdrawing substantial sums of money, more according to the evidence than would be paid to a hired manager. It made no difference how much these two partners withdrew as salary because it is coming out of their respective shares.

The Court: The last analysis, the figures \$27,000 is based on this man's opinion. Am I right about that?

Mr. Romley: That is right, your Honor.

(Testimony of Robert T. Jenkins.)

The Court: I don't see what we bother with Brown for because it comes down to this man's opinion based on some figure he has.

Mr. Romley: It includes Brown and some others, yes.

Q. (By Mr. Romley): Mr. Jenkins, now I would like to go to Exhibit 11 which is Schedule C. Have you seen this exhibit and taken part in its preparation? A. Yes, sir.

Q. Directing your attention to the first item on that exhibit, the sawmill acquired by Duke City from Gallagher, and based upon all of the knowledge at hand, including your familiarity with that particular sawmill, do you have an opinion as to the amount of timber that sawmill could produce [331] or the number of years it still could be used, as of the time of this contract, November 6, this contract of Duke City with Gallagher, November 6th, 1958?

A. Yes, I have an opinion.

Mr. Moore: Your Honor, I wanted to object to that and the witness answered before I objected. I cannot see that it is relevant or material to any issue in this case.

The Court: I don't see what you mean, Mr. Romley. I don't understand your question.

Mr. Romley: Your Honor, here is the situation very briefly. We have projections here of what the profit would be from the operation of this mill through the year '73, which is fifteen years after the purchase of the Gallagher properties. During

(Testimony of Robert T. Jenkins.)

that period of time it is necessary certain equipment and machinery be used. We have figures that show what the profit is before depreciation. Manifestly we are not entitled to collect that full amount if we are entitled to recovery, but we must reduce that amount by the cost of depreciation over the period of utility of that particular equipment or machinery. And it is the purpose of this examination to develop what would be a fair item of depreciation per thousand board feet, based on the life of the equipment then existing and based on what equipment had to be replaced and its cost and its life. [332]

The Court: How much lumber could be processed, are you getting at how long—

Mr. Romley: I could ask it in that way, based on the production shown on the schedule. Maybe that would be clearer.

The Court: The schedules aren't in evidence.

Mr. Romley: I understand that. I haven't offered them. There are some things in, the amount of the over-run is reflected in these exhibits, all of them and there has been no testimony yet and I haven't offered them because I haven't laid the entire foundation. But so far as depreciation, I think the defendants have a right to insist the net profit be reduced by the depreciation, or at least I am sure they would so contend, if they don't make that contention we wouldn't have to go into it.

(Testimony of Robert T. Jenkins.)

The Court: I am sure that is true, but it was the form of your question.

Mr. Romley: I will rephrase it, your Honor, and try to cover it by years.

Q. (By Mr. Romley): Mr. Jenkins, have you also seen and examined and taken part in the preparation of Exhibit 13, which is entitled Schedule E, that shows the production of available timber by years? A. Yes, sir.

Q. In your opinion was there available for production [333] by the Gallagher mill the amount of timber shown on Exhibit 13?

Mr. Moore: We object to that, if your Honor please—let me see the exhibit, Mr. Romley. The amount of timber referred to there, he is asking for an opinion of this witness. There are written documents, written contracts, cutting records and other documentary evidence that will establish what the figures are, and that is the best evidence and the oral testimony in that regard from this witness should be excluded.

The Court: Of course it is very leading to ask the witness this this way. Certainly he would be entitled to testify as to what timber would be available for that mill and its source and all about it, he can do that. I am going to let him answer, Mr. Moore, you can cross examine him about it. I think the real vice of the question is that it is leading.

Mr. Moore: I will incorporate that in my objection.

(Testimony of Robert T. Jenkins.)

Q. (By Mr. Romley): I will try to reframe it. Mr. Jenkins, have you made any calculation seeking to determine the amount of timber that was available for production through the years from 1959 through the year '73?

A. Yes, sir, I have.

Mr. Moore: I object, your Honor, until we segregate what was purchased in the transaction we are litigating as [334] compared with future Forest Service sales.

The Court: He may testify and I assume you will get to the detail of what lumber he considers to be available and its source in the process of the examination.

Mr. Romley: Your Honor, this very exhibit shows that and when it is finally offered in evidence we have segregated existing from future timber.

Mr. Moore: It is calling for a legal conclusion with respect to some eighteen million feet shown on there, your Honor, which was the subject of one of the exhibits, I don't recall the number, but the pooling arrangement. He is asking this witness his opinion as to whether or not that timber was available, that eighteen million feet shown there had already been cut, sawed, manufactured into lumber and sold.

The Court: Of course the witness now is being asked what in his judgment and opinion would have been available and I am letting him answer. I am not paying any attention to these at the present time.

(Testimony of Robert T. Jenkins.)

Mr. Moore: I assume he was talking about these figures.

The Court: No, the witness is testifying from his knowledge of the situation, his experience in the business and everything else that has been available. As a matter of fact, charts, insofar as they relate or supposed to be [335] based on any existing situation, are to be considered only if they have a foundation in the evidence, and they will be disregarded if there isn't a basis in the evidence for the chart or figure on the chart. But the witness may testify as to what in his judgment and opinion would have been available to the mill in these years in question.

Mr. Romley: Do you have the question in mind, Bob?

The Witness: I would like it read, please, sir.

(The last question was read.)

Q. (By Mr. Romley): In your opinion how much timber was available for production at that mill during those years? A. Sir?

Q. In your opinion how much timber was available for production in the Duke City mill, Gallagher mill, during those years '59 through '73, inclusive?

A. My opinion is recorded in this exhibit, net lumber recovery, some two hundred sixty-six million—

Mr. Moore: I object to his testifying from the exhibit.

(Testimony of Robert T. Jenkins.)

The Court: I didn't hear the rest of the answer.

The Witness: Two hundred sixty-six million five hundred sixty-five thousand is the total aggregate.

The Court: It may stand.

Q. (By Mr. Romley): Now, Bob, getting back to the question I asked a while ago with regard to Exhibit 11, Schedule C, [336] based upon your knowledge of the matter, including your familiarity with the sawmill purchased by Duke City from Gallagher, do you have an opinion as to the remaining life of that sawmill as of November, 1958?

Mr. Moore: May the record show our continuing objection, if your Honor please?

The Court: Very well.

A. Fifteen years or more.

Q. (By Mr. Romley): Now, with regard to the planing mill, the same question.

A. The same answer.

Q. And the shop? A. Same answer.

Q. And the dry kiln—or rather lumber shed?

A. Same answer.

Q. Dry kiln? A. Same answer.

Q. There is an item purchased by Duke City from Gallagher which they had referred to as office building and equipment. Dealing now for the present only with the office building as distinguished from the equipment, do you have an opinion as to the remaining usable life of that office building as of November, 1958?

A. In excess of fifteen years.

(Testimony of Robert T. Jenkins.)

Q. And the bunkhouse? [337]

A. The same.

Q. The stacking sticks, foundation spacers and roof boards?

A. In excess of fifteen years.

Q. The camp? A. The same answer.

Q. Now, with reference to the carriers and lift trucks and the trucks, trailers, auto patrols and Ford pickup, do you have an opinion as to the remaining usable life of those items of equipment as of November, 1958? A. Yes, sir.

Q. And how many years?

A. Considering their condition they should probably be replaced within a period of three years.

Q. Now, after the three years time, I assume it would be necessary to replace these later items?

A. Yes, sir.

Q. And when replaced do you have any opinion as to how long newly replaced or new equipment would then last?

A. Based on our operating experience and our company, a period of six years.

Q. Six years? A. Yes, sir.

Q. Then as to the existing items of equipment I have last enumerated would last for three years and you replace [338] them then and they were good for six years you would then have to replace them again at the end of the first nine years?

A. Yes, sir.

Q. They would presumably last for the other six years, carrying you into the fifteen years?

(Testimony of Robert T. Jenkins.)

A. They should, yes.

Q. That is based on your own experience, knowledge of your own operation?

A. Yes, sir.

Q. Bob, about the question of net log scale and net lumber recovery, I think you or some other witness told us of that term. Net log scale is the timber as it comes to the mill, is that right?

A. Would you like me to give an explanation of what it is?

Q. I am interested in having you tell the Court what you mean by this question of over-run that we started to go into and were diverted and how that is arrived at.

A. Net log scale is the difference between gross log scale and the assumed defect that is scaled out of the log by professional foresters, and they have a very rigid schedule they follow in making deductions for this defect. It also takes into consideration such factors as kerf, which is the amount of log that is taken out by the saw and made [339] into the form of sawdust. That is in general the net log scale definition. Net lumber recovery, the definition would be the volume of footage that is received at the end of the manufacturing operation after having made deductions for trim allowances and interior quality and cutting out the defect.

Q. Does the manner and the efficiency of the operation have anything to do with the relationship of net lumber recovery to net log scale?

(Testimony of Robert T. Jenkins.)

A. Yes, sir.

Q. In what way?

A. An inefficient sawmill will take, for instance, a circle saw could possibly have a kerf of five-sixteenths of an inch. An efficient band mill would have a saw clearance of some five thirty-seconds or one-half, so out of every five boards you should pick up an additional board which would increase your net lumber recovery volume at the end of your manufacturing operation.

Q. The band mill operation is the more suitable and more efficient?

A. Yes, sir.

Q. And what kind of saw do you have at the sawmill?

A. We have a band saw.

Q. You have a band saw, the better one?

A. Yes, sir. [340]

Q. Generally what has been your experience in the Nagel mill in taking timber from the Sitgreaves National Forest, the Chevalon working circle, has your net lumber recovery exceeded the net log scale or has it been less than the net log scale?

A. It has exceeded the net log scale.

Q. Have you personally made any check to determine that, Bob?

A. Yes, sir.

Q. Have you made a study of any period of time to determine the amount by which the net lumber recovery was greater than the net log scale?

A. I might answer your question that our company has made such a study of the years and they have taken the volume of net log scale that we have

(Testimony of Robert T. Jenkins.)

paid for and applied the net lumber recovery that we shipped for each succeeding year and have those figures, yes, sir.

Q. Have you checked it and particularly with reference to recent years? A. Yes, sir.

Q. For what years?

A. I think we have been for 1959, '58, '57, '56, right on back.

Q. Can the difference in the amount, the increase of net lumber recovery over the net log scale be expressed [341] percentage-wise?

A. We have made such percentage computations, yes, sir.

Q. By what per cent has the net lumber recovery during the past three or four years exceeded the net log scale?

A. I seem to recall a figure of some twenty-nine per cent, Mr. Romley. That is the figure that is in my mind.

Q. Do you note from one of these exhibits, I believe it is No. 9, Schedule A, you have shown the net log scale and net lumber recovery, that is correct, is it not? A. Yes, sir.

Q. Do you note there an explanation as to the percentage used in arriving at the net lumber recovery as compared to the net log scale?

A. Yes, sir.

Q. How much was that?

A. Fifteen per cent.

Q. That is less than your experience, is that right? A. Yes, sir.

(Testimony of Robert T. Jenkins.)

Q. The difference between the excess of the net lumber recovery over the net log scale is the overrun, I believe you told us earlier, that is the term?

A. Yes, sir, that is the term.

Q. Bob, you don't recall, or do you, sir, the exact amount of Duke City Aztec and Gallagher Aztec and Forest Service Aztec as the same existed in September or November, [342] 1958, do you, or are they contained in some records?

A. I obtained it in some way.

Q. Or are they contained in some records. Do you have some trouble with your hearing?

A. Yes, sir, I am having trouble now.

Q. Normally do you have trouble with your hearing?

A. Yes, sir.

Q. In both ears? A. Yes, sir.

Q. To what extent?

Mr. Moore: I don't think that has any relevancy. This is not a personal injury case, your Honor.

The Court: No, that is proper. The witness might seem to be hesitating.

Mr. Moore: If he has difficulty with his hearing, fine, but the percentage of it, whether one ear or both ears——

The Court: I didn't think we were going into that.

Mr. Moore: That is what I am objecting to.

The Court: I think he is trying to explain why the witness sometimes hesitates or asks for repetition. He may properly do that.

(Testimony of Robert T. Jenkins.)

Q. (By Mr. Romley): You use a hearing aid, do you?

A. Yes, sir. I think, Mr. Romley, you asked a question that I did not answer. [343]

Q. Yes, I asked you with regard to the Duke City Aztec, the Gallagher Aztec and the Forest Service timber as it existed under contracts in effect in September and in November, 1958. Do you have any independent recollection, Bob, as to what those various amounts are?

A. Yes, sir. I think I can recall from memory but they probably would be approximate amounts.

Q. We will try to get them more accurate from another source then. A. Yes, sir.

Mr. Romley: You may cross examine.

Recross Examination

Q. (By Mr. Moore): Mr. Jenkins, did I understand you to testify to Mr. Romley a while ago that Mr. Brown was general manager of Nagel Timber & Lumber Company when he worked there?

A. Mr. Brown had a contract with Nagel Timber & Lumber Company——

Q. Just answer my question. Did you tell Mr. Romley that Mr. Brown was the general manager of the Nagel Lumber & Timber Company?

A. That was his title, yes, sir.

Q. Let me read from the transcript of yesterday's testimony of Mrs. Nagel, her answer appearing on line 7, page 19: [344]

(Testimony of Robert T. Jenkins.)

“Answer: George M. Brown was assistant manager. I can’t be sure of it. When he first came there he was not well enough acquainted with the business to be assistant manager but he really did take hold well and I can’t remember when I made him assistant, but I would say probably ’52 or maybe ’53, I am not sure.

“Question: And how long did he continue in that capacity?”

“Answer: Until 1955.”

Did you say you and Mrs. Nagel drew 30,000 and 15,000, \$45,000 in 1958 and ’59, or was that 1959?

A. I think, sir, the figure was about 45,000 in ’58 and about 51,000 is my recollection for 1959.

Q. And was that your compensation?

A. Not necessarily.

Q. Do you draw compensation from the Nagel Lumber & Timber Company for your services?

A. I do.

Q. Does Mrs. Nagel?

A. I believe she does, yes, sir.

Q. In fact, your partnership agreement under Article 9, page 4, subparagraph B provides that the general partners who devote working time to the business affairs or partnership shall be paid a reasonable sum as compensation for such [345] services.

Now, how long have you been in the lumber business, since 1951, did you tell us?

(Testimony of Robert T. Jenkins.)

A. 1952 I have been working in the lumber business in one phase and another.

Q. Have you ever seen a sawmill that was used throughout its entire life so you know how long it is going to last? A. No, sir.

Q. When you say the sawmill of Duke City would last in excess of fifteen years, how many thousand feet or million feet are going to be run through it each year, do you know?

A. As much as it is manufacturing right now or less, as the timber supply differs.

Q. Do you know when that sawmill was bought new?

A. I know when it was brought to its present site, whether it was new or not, no, sir.

Q. You don't know whether it was new or used when it was moved to Winslow?

A. I believe I know, yes, sir.

Q. Which was it?

A. I think it was primarily used machinery.

Q. It was used machinery when moved to Winslow and has been there how long?

A. Some ten years.

Q. What is the average life of a sawmill running full capacity? [346]

A. I know one that has been in operation for thirty years.

Q. Is that the average? A. No, sir.

Q. What is the average?

(Testimony of Robert T. Jenkins.)

A. I have not made a study of the life of a sawmill, Mr. Moore.

Q. Upon what do you base your opinion then when you say this one will last within an excess of fifteen years?

A. I base my opinion on other sawmills that are established and have been established and running in the area.

Q. And been in operation how long?

A. Fifteen years, some of them twenty years, some thirty years.

Q. Which one do you know of that has been in operation thirty years? A. McNary.

Q. Is that operated by Southwest?

A. Southwest Lumber Mills, yes, sir.

Q. Been any replacements in it in those thirty years?

A. I'm sure there have been, yes, sir.

Q. What about the planing mill, do you know of a planing mill that has been in operation for more than fifteen years? [347]

A. Yes, sir.

Q. Where? A. Nagel Lumber Company.

Q. How long has that one been in operation?

A. 1946, I believe this is the fifteenth year.

Q. How much longer is it good for?

A. I have no idea. It is in operation in full capacity today.

Q. This dry kiln, do you know when that was built? A. Yes, sir, I am afraid I do.

(Testimony of Robert T. Jenkins.)

Q. When?

A. In 1951 I believe the first one was built.

Q. It is good for fifteen years?

A. I helped build it.

Q. I say it is good for fifteen more years?

A. Yes, sir.

Q. In other words, the sawmill, the planing mill, the shop, the lumber shop, the dry kiln, office building, the shed, all of them are good for fifteen years?

A. In my opinion, yes, sir.

Q. It is only the carriers and lift trucks that are going to wear out quicker, and that is about three more years you think? Is that what you said, in your opinion?

A. I said they would in my opinion have to be replaced within three years, yes, sir. [348]

Q. These stacking sticks, foundation spacers and roof boards forever?

A. How do you replace a building [349] foundation?

Q. (By Mr. Moore): Now with respect to this overrun that you are talking about, is that going to continue in the future the same as it has in your operation?

A. We expect it to, yes, sir.

Q. Don't you know as a fact that the Forest Service right now is revising their method of scaling so that the overrun will be reduced?

A. To 15 percent or thereabouts, yes, sir.

(Testimony of Robert T. Jenkins.)

Q. Are they going to get it exact?

A. Oh, no, I doubt that. But that's the figure we assume they will arrive at.

Q. That's what they are going to try to arrive at?

A. In that general—

Q. Is that your understanding?

A. No, they are going to determine the actual overrun from these mill scale studies.

Q. But they are making studies right now so that they may prove the condition and the overrun will be reduced, that's true, isn't it?

A. Not necessarily, no, sir.

Q. What part of it is not true??

A. That the overrun will be reduced. It's possible that it may be increased.

Q. Are they making these studies for the purpose of reducing the overrun? [350]

A. They are making the studies for the purpose of determining the overrun.

Q. That's your information?

A. Yes, sir.

Mr. Moore: That's all.

Mr. Romley: That's all.

Your Honor, I have a rather lengthy witness, I prefer to start him in the morning if I may.

The Court: Very well. We will recess then until 9:30 in the morning.

(Whereupon, a recess was taken from approximately 4:20 o'clock p.m. on May 4th, 1960, until 9:30 o'clock a.m. on May 5th, 1960. [351])

(Testimony of Robert T. Jenkins.)

May 5, 1960, 9:30 O'Clock A.M.

Mr. Romley: If the Court pleases, I understand that counsel would at this time like to call for cross examination Mr. Brunell, the right to do which he reserved yesterday.

Mr. Moore: Mr. Brunell would like to get away and I told him that I would dispose of him first.

DONALD A. BRUNELL

recalled as a witness herein, after having been previously duly sworn, testified further as follows:

Further Cross Examination

Q. (By Mr. Moore): Mr. Brunell, these exhibits, Plaintiffs' Exhibits 9, 10, 11, 12 and 13?

A. Yes, sir.

Q. It might be well if you had those so that you could—do you have them or does the clerk have them, Mr. Romley?

Mr. Romley: I think the clerk has those.

Q. (By Mr. Moore): Now, as I understand it, Plaintiffs' 9, I believe you said you did not prepare that other than to check the mathematical accuracy there? A. That is correct.

Q. And number 10, did you prepare that? [352]

A. In fact I prepared the original, it was adjusted for some errors which I had made and subsequently I checked the revised copy.

(Testimony of Donald A. Brunell.)

Q. The items shown on Plaintiffs' Exhibit 10, I believe under net sales FBM, I believe you said you took those from the annual reports, Exhibit 7-A, et cetera?

A. That is correct, rounded to the closest one thousand feet.

Q. And under "amount" you took that as the gross sale price shown in those annual reports?

A. No, sir.

Q. What is that?

A. That is the net operating profit.

Q. Well, that's what I meant, the net—

A. Adjusted for the salary expense with—prior to depreciation, put it that way.

Q. And the average per thousand was calculated from the total board feet sold and the net proceeds received therefrom?

A. Correct.

Q. Did you prepare a gift tax return for the Nagels when the partnership was set up?

A. I did not.

Q. Did you have anything to do with the figures which were produced—well, let me ask it this way:

Mr. Brunell, did you have anything to do with the [353] preparation of figures to determine the value of the property when this trust was set up and the gift tax return filed?

A. You mean for the gift tax purposes?

Q. Yes. A. No.

Q. I believe that if we do locate it here that counsel will agree that in the computations made they used the period of five years as a basis for

(Testimony of Donald A. Brunell.)

determining value. Now looking at Plaintiffs' Exhibit 10, Mr. Brunell, and using the last five years from '55 to and including 1959, could you calculate that the total of net sales FBM for those five years would be 104,595,000?

A. '55 through '59?

Q. Yes.

A. Well, without a quick check I would calculate that to be approximately correct.

Q. And if we take the five years of the alleged net profit in the column under "amount," that total would be approximately \$1,017,830?

A. That would appear correct.

Mr. Romley: What was that figure?

Mr. Moore: \$1,017,830.

Mr. Romley: I'm not sure I got the question. Will you ask it again so I will see what that figure represents, please [354]

Mr. Moore: It represents the total in the column entitled "amount" for the years '55 through '59, inclusive, the last five years.

The Witness: Do you want me to mark on these exhibits? I have no other means of calculating?

Q. (By Mr. Moore): Well, we may be able to expedite this, Mr. Brunell, if I am over here.

A. The total in the amount for the five years is approximately \$1,018,000.

Q. I had it \$1,017,830, and you say approximately \$1,018,000? A. That's correct.

(Testimony of Donald A. Brunell.)

Q. Now, the weighted average profit on that figure calculated in the same manner that it was calculated on the exhibit would be approximately \$9.73, wouldn't it? A. That's right.

Q. And in the calculation on that exhibit, Mr. Brunell, for the last five years, I believe the management fee of \$27,000 was not included for two and three-quarter years of the last five years approximately?

A. It would not be included in 1955, that is correct. Neither would it be in 1956 and there would be three-quarters of it not included in 1957, that's right.

Q. So it would include only one quarter for '57?

A. That is correct. [355]

Q. And the management fee for '58 and the same for '59? A. Right.

Q. Now, if that were included, and you may not want to calculate this. If that management were included for the full five year period, actually it would reduce that weighted average profit by approximately 70 cents per thousand board feet. Can you estimate that to see if that's reasonably accurate? [356]

A. That is correct, that figure.

Q. If that is not included then the weighted average profit on that exhibit for the last five years would be approximately \$9.03 instead of \$11.29?

A. Figuring it that way, that is correct.

(Testimony of Donald A. Brunell.)

Q. Let's look for a moment, Mr. Brunell, at Plaintiffs' Exhibit 11. First tell me as best you can so I can explain it, if that is possible, what you mean in accounting by depreciation?

A. Depreciation is the wasting of an asset through use, might be the description for it. It is the fact a new item put into use immediately begins to wear and in due time lives out its useful life and is fully depreciated.

Q. This won't be in accountant's language, but as a practical matter, Mr. Brunell, to apply it to the books you take away from the profit each year what is calculated as reasonable depreciation for that year and theoretically put it over here in another pot to have that money to replace a piece of equipment when it is worn out?

A. That is in theory.

Q. That is in theory the practical operation of it. And in theory then, Mr. Brunell, if you have a piece of equipment that is calculated will last six years and it is depreciated over a period of six years, at the end of three years then you have taken away fifty per cent of [357] it by wear and tear; in this other pot you have fifty per cent of the money, a fund equal to fifty per cent of the replacement value?

A. That is assuming you are operating on straight line balance.

Q. Yes. At the bottom of Plaintiffs' Exhibit 11 you have two replacements at the end of three years and not to get into such minute detail let's look at

(Testimony of Donald A. Brunell.)

the larger one, the 149,197.50. That is intended, I assume on this exhibit to represent the depreciated value of the equipment that was half worn out when we started this schedule, is that correct?

A. The replacements, whether it was half worn out or not, I don't know.

Q. I mean theoretically on the replacement schedule. It was six years, three of it is gone?

A. Three years of it is gone, the balance of it would be gone at the end of three years.

Q. So that at the end of three years it would all be gone and to replace it we would replace it with new ones, wouldn't we?

A. That is correct.

Q. Which would be double this figure?

Mr. Romley: Just a moment, if your Honor please, I object to the form of the question. No proper foundation [358] has been laid to show this witness knows this would be double or any more than this same figure.

The Court: He may answer.

Mr. Moore: I don't mean to argue with you, Mr. Brunell, if I sound that way don't misunderstand me.

A. Would you restate your question, please?

Q. (By Mr. Moore): The figure there represents the balance of the depreciation of the equipment on a six year schedule, doesn't it?

Mr. Romley: Just a moment, if your Honor please, I object to that question. That is not the evidence thus far. The evidence thus far is that

(Testimony of Donald A. Brunell.)

Duke City took in these items of equipment, these two groups aggregating \$157,000 at those figures, not at the depreciated book value of Gallagher when they took over. That is not the evidence. It is the values they allocated to the equipment themselves.

The Court: Counsel is examining about the replacements, the particular one in the replacement list here at the end of three years.

Q. (By Mr. Moore): Actually that should be doubled on that exhibit, shouldn't it, Mr. Brunell?

A. It would appear that.

The Court: I didn't hear the answer.

Mr. Romley: I didn't hear it either.

Mr. Moore: He said it would appear that. [359]

The Witness: In reply to his question I would say—in the first place, I know nothing about this equipment. I don't know what lives they have on it. Accordingly I can't tell you whether it will last six years or three years.

Q. (By Mr. Moore): I don't expect you to, Mr. Brunell.

A. The assumption is that the equipment they acquired at the end of three years will be gone and will have to be replaced.

Q. With new equipment?

A. With new equipment.

Q. And the new equipment would cost double half of the depreciated value?

(Testimony of Donald A. Brunell.)

Mr. Romley: Just a moment, if your Honor please, again I object. The witness has not been qualified as to the cost of new equipment.

The Witness: No, you are out of my field there, I don't know enough about it.

Q. (By Mr. Moore): I mean on this exhibit, Mr. Brunell, the way it is prepared, actually that replacement figure, if you analyze this exhibit, would be doubled, will you agree with me on theory that will be correct?

Mr. Romley: I object to that, if your Honor please, because the witness has already said in response to the last question, "I don't know." [360]

The Witness: That's correct, I don't.

The Court: The answer may stand.

Q. (By Mr. Moore): At the end of nine years we have on this exhibit exactly the same figure. How is that arrived at?

A. Did I state in prior testimony that I prepared this schedule?

Q. No, I don't think you did. I am not implying you did.

A. I don't know how it was arrived at. I only checked the mathematical amounts.

Q. I didn't ask you in advance if you had prepared this, but I was discussing with you more or less from a theoretical standpoint, trying to analyze these replacement values and I concluded they should be doubled and I wondered if it appears that way to you?

(Testimony of Donald A. Brunell.)

Q. The assumption is that at the end of six years you will replace those again.

Q. You are replacing them here with the same dollar value in this exhibit? A. Correct.

Q. As you had on them at the end of three years? A. That is right.

Q. And if at the end of three years that represented the depreciated value of used equipment on a six year schedule to [361] replace new equipment, theoretically it would be doubled, wouldn't it?

A. That is correct.

Q. If that is true and we round that out, that would increase the total depreciable investment by \$300,000 and make it a million one hundred seventy-four thousand nine hundred twenty-eight instead of 874,928?

Mr. Romley: I object to the question, if your Honor please, upon the ground no sufficient foundation has been laid to take a higher base than is here shown. The witness has said, "I do not know that the cost would be doubled." He said in theory it may be.

Mr. Moore: He said in theory on this exhibit it may be and the theory we are discussing, your Honor.

The Court: In view of the witness' disclaim about any real knowledge about this depreciation schedule the objection is sustained.

Q. By Mr. Moore): Let me ask this, Mr. Brunell. Will you assume for the moment with me that the depreciation as shown on that schedule

(Testimony of Donald A. Brunell.)

should be increased by \$300,000 and that that is spread over 266 million plus board feet to get a per unit rate of depreciation per thousand, it would actually be \$4.38 instead of \$3.28, do you agree with that?

Mr. Romley: Just a moment. I object to that. It is the same question stated in slightly different manner, [362] unless counsel avows that he will bring in evidence to show that there is any basis for this assumption.

Mr. Moore: We are talking about your exhibit, Mr. Romley.

The Court: This is a hypothetical question and this witness has testified as a mathematical expert. He said he has verified the accuracy of the mathematics. Counsel has given him a hypothetical mathematical problem. He said assuming this is something over a million and you still have this, mathematically it doesn't work out to such and such, to that extent it is proper. Strictly as a matter of mathematics, not of depreciation.

A. Assuming additional \$300,000 depreciation you would have approximately a \$4 figure per thousand. Does that answer your question?

Q. (By Mr. Moore): Let's look at Plaintiffs' Exhibit 12 a moment, Mr. Brunell. Let me ask you, did you prepare that exhibit? A. No, sir.

Q. You checked just the mathematical computations? A. Correct.

(Testimony of Donald A. Brunell.)

Q. Do you know or have any way of knowing where the fifty million feet figure came from under paragraph one where it talks about \$3 per thousand?

A. The original source of that? [363]

Q. Yes. A. No, I do not.

Q. Can you tell by looking at that, Mr. Brunell, whether or not the depreciation that was figured on 266 million plus feet includes the 50 million feet at the top of this or is that applied to only 215 million feet?

A. My understanding is, from the mathematical calculation and checking that, it applies only to the 215 million feet.

Q. So it would appear from the face of the exhibit that there is 50 million feet there against which no depreciation is charged?

A. That I couldn't say.

The Court: Do you mean, Mr. Brunell, this minus depreciation of 874,000 when spread over total production 266 million plus is not accurate?

The Witness: It is accurate, your Honor, to the 328, assuming the 874,000 spread over the 266. His question regarding paragraph one, the \$3 and the 4.33, I don't know if depreciation was considered in that calculation or not.

The Court: Was it only figured on the 215 million in paragraph two?

The Witness: As far as this depreciation spread over 266 million feet, yes.

(Testimony of Donald A. Brunell.)

Mr. Romley: I had the same problem the Court had in mind in this matter, if it hasn't been clarified it should be. [364]

The Court: It isn't as far as I am concerned as yet. [365]

Q. I don't know, Mr. Brunell, let me ask you to assume with me a moment.

Assume that the correct depreciation is four thirty-eight instead of three twenty-eight.

A. Right.

Q. And assume the four thirty-eight is not charged in that exhibit against the fifty million net figure. Then where it does show four thirty-three per thousand with a profit in fact would show five cents per thousand loss, wouldn't it?

Mr. Romley: Now, just a minute, I object to the form of the question and it has no probative value. He's asking him to assume one figure that he has already said is not accurate. He said it would be approximately four dollars and not four dollars thirty-eight cents, and I think it is confusing and misleading, your Honor.

The Court: I think it is confusing and actually it's a matter of—

Mr. Moore: We can actually calculate that, we will show that, your Honor.

Mr. Romley: We have a calculator if counsel wishes the witness to have it for these calculations, we can send for it.

(Testimony of Donald A. Brunell.)

Q. (By Mr. Moore): Now, Mr. Brunell, I believe you agreed a moment ago on certain calculations with reference to Exhibit 10 that if we used the last five years and the \$27,000 figure, [366] that we discussed that was not included in certain years? A. Correct.

Q. That the net profit there would come down to approximately \$9.03? A. That's correct.

Q. Now, looking at the bottom of Exhibit 12, and assuming as we did the last five years with the profit before depreciation of \$9.03, and assume with me if you will that the corrected depreciation would be four thirty-eight instead of three twenty-eight, then will you agree that the net profit per thousand would be \$4.65 instead of \$8.01 as shown on Exhibit 12?

A. With those assumptions, yes.

Q. Now, there is just one or two other items here with respect to those exhibits I wanted to ask you about.

Refer to Exhibit 10, please, and let me have the 7 series. Now, Mr. Brunell, let me hand you Plaintiffs' Exhibit 7-E, is the report for the year ending December 31st, 1956. Does that report show that plaintiffs paid out interest, \$13,673?

Mr. Romley: As you answer the question will you please indicate what page it is on so that we can later come back to it readily?

A. On page marked 1956-18, under the heading of "other expense, interest," \$13,673.11. [367]

(Testimony of Donald A. Brunell.)

Q. In the calculation shown on Exhibit 10 does that \$13,673 appear as a charge against profits?

A. It does not.

Q. Also, Mr. Brunell, in the 1956 report does that show bad debts, \$4,778? A. It does.

Q. Was that figure taken into consideration—

A. It was not.

Q. —in the calculation on Plaintiffs' Exhibit 10? A. It was not.

Q. Now, let's look at 1957.

Mr. Romley: Is that the year end for '57?

Q. (By Mr. Moore): In either of those exhibits, I don't know which one it is, would you look and see if there is interest charged of \$24,687?

A. In the reports combined there is an interest charge of \$24,687.60.

Q. Was that figure taken into consideration in the computation made on Plaintiffs' Exhibit 10?

A. It was not.

Q. Look at the year 1958. In that report for the year ending December 31st, 1958, is there an interest charge of \$12,479?

A. That's correct.

Q. And is there a bad debt charge of \$2,100?

A. That is right. [368]

Q. Are either of those figures taken into consideration in the computation made on Plaintiffs' Exhibit 10? A. They are not.

Q. Now, while we are talking about these things, Mr. Brunell, just a couple of items I want you to look at for me, please. The report for the year

(Testimony of Donald A. Brunell.)

ending 1955, what I want you to look at there, Mr. Brunell, in that report is the depreciation schedule with respect to the dry kiln and saw mill number 2. A. All right.

Q. What was the value shown there on the dry kiln?

Mr. Romley: Will you again please give us the page so we can see?

A. Which value do you want?

Q. (By Mr. Moore): At the beginning of the year.

A. You want the cost less depreciation, you want the cost—

Q. Well, what's shown there?

Mr. Romley: Well, now, will you please tell me what page you are on so I can try to follow?

A. All right, 1955-15. The dry kiln showed the cost of \$59,230.06.

Q. (By Mr. Moore): Now, what does it show as charged off for depreciation on that unit that [369] year? A. \$28,836.81.

Q. Now, saw mill number 2, what does it show as the cost or the value at the beginning of the year and what depreciation is charged off?

A. At the beginning of the year it shows a cost of \$14,178.12, with additional acquisition of \$40,257.15.

Q. Could you calculate approximately the total of those two figures? A. That is right here.

(Testimony of Donald A. Brunell.)

Q. It is there? A. \$54,435.27.

Q. That's the total cost as far as that report shows of saw mill number 2?

A. That's correct.

Q. What was the depreciation charged off that year against it? A. \$11,936.96.

Q. Now, Mr. Brunell, with reference again to Plaintiffs' Exhibit 10, that first column I believe you have already told us shows the total net sales by the plaintiffs during each of those years?

A. Correct.

Q. And there are none of them as high as thirty million feet, are there?

A. Not sales, no sir. [370]

Q. You told us, I believe, that 1957 the report showed a loss on the report? A. Correct.

Q. And I believe you said something about that was the year of the fire?

A. That is right. The year of the fire was '56; however, they were sawing fire-damaged timber during '57.

Q. How did the fire—or if I understood you, did I understand you correctly to mean that the result of the fire was this loss or that the fire caused this loss?

A. The fire caused—they had to move in, they were required to move in and work this fire-damaged timber. It was damaged, stained and so forth. As a result of a low grade of timber and a low grade of lumber which, of course, their net recovery per thousand is not as great. They were

(Testimony of Donald A. Brunell.)

forced, actually the high volume there, they were forced in order to salvage what was in the way of merchantable timber to go in there and get it out in a hurry.

Q. Did the fact that they were, if this is a fact, that they were cutting Aztec timber at a higher stumpage contribute at all to that loss?

A. I don't think so.

Q. You attribute it all from your knowledge of the records and the situation to the fire?

A. I do. [371]

Q. At least the fire was a hazard in 1957 as far as the plaintiffs' operation is concerned?

A. That's correct.

Q. What I want to ask you about with respect to those, Mr. Brunell, is one at a time if you want to lay them over there, or if I can hand them to you one at a time it will help.

A. Sure, hand me the one you are interested in.

Q. Let me hand you Plaintiffs' Exhibit 7-I, being the report for the year ending December 31st, 1959. And tell me if—I don't know which page this is on. It's the total logs sawn and lumber from the saw mill.

Mr. Romley: The total what?

Mr. Moore: It's a new word that I find in this, logs sawn.

A. Logs sawn, 23,664,160.

Mr. Romley: What page are you reading from?

(Testimony of Donald A. Brunell.)

A. It's page 1959-8.

Q. (By Mr. Moore): Logs sawn, 23,664,160?

A. Right.

Q. And right beneath that, is underrun?

A. That is correct.

Q. 1,242,248? A. That's right.

Q. What does underrun mean? [372]

A. That's a counter to overrun. It means they actually recovered less from the log as I see it.

Q. In other words, for that year there was a million feet underrun instead of a 15 percent overrun as estimated in these exhibits, is that correct?

A. That's correct.

Q. Now, let's look at 1958 and look for the same thing. A. It's on page 1958-7.

Q. Logs sawn? A. 21,877,500.

Q. And you have an overrun of 122,000?

A. You have an underrun — no, an overrun, 122,000.

Q. And what, under the column "lumber from saw mill," what is that figure? A. 21,999,870.

Q. Would you say that six-tenths of one percent overrun would be approximately correct or is it underrun?

No, it's an overrun.

A. That's an overrun.

Q. Approximately six-tenths of one percent?

A. That's approximately correct.

(Testimony of Donald A. Brunell.)

Q. Let's look at 1957, looking for the same thing. I don't know whether the total will be in the last one or whether you will have to look at both of of them.

A. We will have to look at both of them. [373]

Q. What I want to get, Mr. Brunell, is the total logs sawn for the year 1957.

A. Those figures, Mr. Romley, are on page 1957-5 in the September 30th report, and 1957-20 in the December 31st report.

Mr. Romley: Thank you.

A. Total logs sawn, 25,562,840 feet.

Q. Now, lumber from saw mill, what was the total?

Mr. Romley: Lumber from where?

Mr. Moore: Lumber from saw mill.

A. 25,897,609 feet.

Q. (By Mr. Moore): Now, would you say, Mr. Brunell, that that represents approximately 1.3 per cent overrun?

A. With an overrun of 334,769 feet.

Q. But the percentage would be approximately 1.3?

A. That's correct.

Mr. Romley: What percentage did you say?

Mr. Moore: 1.3.

Q. (By Mr. Moore): Now, let's look at 1956, Mr. Brunell.

Give us the page and the total figure in the column "Logs sawn," in 1956.

The Court: What exhibit is this?

(Testimony of Donald A. Brunell.)

Mr. Moore: This is for the year ending 1956, the report.

The Court: I think if you would use the exhibit number—— [374]

Mr. Moore: This is Plaintiffs' Exhibit number 7-E. Maybe I didn't do some of these others, your Honor. Would it help if I gave them?

The Court: I think the record can show that on this testimony about underrun and overrun the witness began with 7-I and has worked back and is now at 7-E, and has taken all the exhibits in order.

Mr. Moore: Thank you.

Q. (By Mr. Moore): Do you find that, Mr. Brunell?

A. Yes, sir, that's on page 1956-22.

Q. And what is the total figure of logs sawn?

A. 21,317,290.

Q. And what is the total figure of lumber from the saw mill? A. 21,665,124.

Q. That is an overrun of 347,834?

A. Correct.

Q. Or approximately 1.6 percent?

A. Correct.

Q. Mr. Brunell, I don't find it here. Do you recall which exhibit, Plaintiffs' 9, 10, 11, 12 or 13 shows that the calculation was based upon an average of 15 percent overrun?

Do you recall that being used?

A. I believe it's 9.

Mr. Romley: Yes, it is 9. [375]

(Testimony of Donald A. Brunell.)

Q. (By Mr. Moore): Yes, that appears on the face of it. The calculations then on Plaintiffs' Exhibit 9 under "net lumber recovery" is based upon a calculation containing an average overrun on net log scale of 15 percent? A. Correct.

Mr. Moore: May I have just a moment, if the Court please. That's all, Mr. Brunell.

Mr. Romley: May I have just a moment, your Honor?

The Court: Surely.

Redirect Examination

Q. (By Mr. Romley): Mr. Brunell, did you hear the testimony yesterday with regard to a definition of the terms "net lumber recovery, overrun, and net log scale," and the use of the term "gross log scale"? A. I did.

Q. Do you know that there are terms in the industry defining or constituting the gross log scale?

A. Yes.

Q. And also the net log scale? A. Yes.

Q. I believe the testimony yesterday was that payment was made on a net log scale basis?

A. I believe that's correct. [376]

Q. Is the net log scale on which payment is made a lesser figure than the gross log scale?

A. I am not a lumber expert, but I would assume it is.

Q. These percentages about which, and these figures about which Mr. Moore last examined you,

(Testimony of Donald A. Brunell.)

do you know whether those are on gross log scale or on net log scale?

A. I would assume they were on net log scale.

Q. You are assuming that in his questions?

A. I don't know.

Q. You don't know? A. No.

Q. If those are either in gross log scale entirely or gross log scale in part and net log scale in part, then your basis is the assumption they no longer exist insofar as those lower percentages are concerned?

A. My assumptions are only on the figures presented me.

Q. I see. I want to go back at the outset to this figure on Exhibit 12, concerning which some confusion exists. That is Schedule D, Exhibit 12. Mr. Moore asked you—do you have it there—asked you with regard to the number of feet on which certain computations were made. You see the figure near the bottom of the page of \$3.28 per thousand?

A. Yes, sir.

Q. Was that figure arrived at spreading the depreciation of 874,000-odd dollars over the 215 million feet he referred [377] to or over the 266 million?

A. That was arrived at by dividing the 874,928 dollars assumed depreciation over production of 266 million five hundred sixty-five feet.

Q. Just as the exhibit states?

A. Just as the exhibit states.

(Testimony of Donald A. Brunell.)

The Court: Mr. Romley, this witness has disavowed anything about this exhibit except the mathematics. I think the proper question should be how did you verify the 328, but these figures are not his, the 874,000 and 266, and I am not placing any reliance on them upon his testimony. As a matter of fact, they are not in evidence as yet. I think properly the question should be directed to a mathematical calculation, because that is all he purports to have done with them.

Q. (By Mr. Romley): Are these mathematical calculations as shown in this exhibit correct?

A. They are correct.

Q. With regard to Exhibit 12, Mr. Moore asked you if you knew the source of the 60 million six hundred sixty-two thousand feet shown under Item 1, Duke City Aztec, you answered in the negative. Will you look at Exhibit 9, which is Schedule A. Is that the same figure shown under 1-A?

A. That is correct. My question from Mr. Moore was the original source. [378]

Q. The original source. Mr. Brunell, you told Mr. Moore that you included a \$27,000 item for management expense in the last two and one-fourth years, namely, the last quarter of '57 and all of '58 and '59, that much per year?

A. That is right.

Q. It was not included in the two and three-quarters prior years of the five year span he mentioned?

A. It was not.

(Testimony of Donald A. Brunell.)

Q. Was the partnership in existence prior?

A. It was not.

Q. Was the management expense during those prior years included in the figure shown on these exhibits?

A. Yes, management expense they had for sales manager and superintendent also.

Q. Exhibit 10 is entitled operating profit of the Nagel mill before deducting depreciation.

A. That is correct.

Q. Normally in stating operating profit, do you take into consideration the items for bad debts and interest?

A. As a practice I do not.

Q. Is that why those figures are not shown on Exhibit 10?

A. Those are considered in the nature of miscellaneous and financial expense and not a part of operation.

Q. Do these items then, are they reflected in any way in the net profit of the operation per thousand? [379]

A. No.

Q. I don't state that question too clearly.

A. If I understand your question they are not.

Q. They are not. I believe it is your testimony you do not know what the replacement cost of these items that were to be replaced on Schedule 11, Exhibit 11 are?

A. That is right.

Q. If the replacement cost was as shown on this exhibit, then the exhibit is correct in that respect or correctly extended?

(Testimony of Donald A. Brunell.)

A. Yes, they are correctly extended.

Mr. Romley: That is all.

Recross Examination

Q. (By Mr. Moore): Mr. Brunell, just one question to clarify a point that may be clear. Prior to October 1st, 1957, there was nothing shown in the books or in these reports, Plaintiffs' Exhibit 7 and following to show any compensation to Mrs. Nagel or any of the owners of the business?

A. None to Mrs. Nagel. However, I think Mr. Jenkins drew a salary prior to his becoming an owner of the business.

Q. Prior to 10/1/57, the date when the partnership was created, I believe that is correct?

A. That is correct. [380]

Q. There was no compensation to any of the owners of the business? A. None whatever.

Mr. Moore: That is all.

Redirect Examination

Q. (By Mr. Romley): The owners at that time were only Mr. and Mrs. Nagel?

A. That is correct.

Q. Only Mrs. Nagel working?

A. That is correct.

Mr. Romley: That is all.

The Court: I have one question, Mr. Brunell, Mr. Romley brought it up. Did I understand you that in order to accurately determine net profit you

(Testimony of Donald A. Brunell.)

would have to deduct from these figures on Exhibit 10 for identification the interest and the bad debt accounts?

The Witness: Yes, sir.

The Court: And the depreciation?

The Witness: That is correct, in determination of net profit.

The Court: What you have done here is show the operating profit before deducting depreciation and the other exhibit purports to show the depreciation per thousand?

The Witness: That is correct. [381]

The Court: Are there any other amounts that would have to be deducted before you would get the net profit other than the interest and bad debts?

The Witness: No, sir, it would require deduction, these figures would require deduction of depreciation, bad debts, interest and other miscellaneous expenses not relative to the operation of the **mill**.

The Court: Thank you.

Mr. Moore: As far as we are concerned, Mr. Brunell may be excused. [382]

Mr. Romley: At this time and as a part of the plaintiffs' case we wish to read in evidence from the deposition of Maurice Liberman as an adverse party from Volume II, Mr. Moore, beginning at page 352, line 2, the following questions and answers, on December 21, 1959.

The Court: I will ask the Clerk to mark for identification Volume II so it will be in the record.

(Plaintiffs' Exhibit 14 marked for identification.)

Mr. Romley: Reading from Plaintiffs' Exhibit 14 for identification, beginning page 352, line 2, being the deposition of Maurice Liberman as an adverse party:

"Question: Now, Mr. Liberman, when you were talking with Mrs. Nagel and Bob Jenkins in the Nagel Lumber Company office on September 20, 1958, you were contemplating at that time acquiring on a fifty-fifty basis, if a deal could be negotiated, a going business, isn't that right, a going business, being that of the Arizona Timber, or Arizona Lumber & Timber Company?"

"Answer: Yes.

"Question: And you were contemplating, or presuming, at least, that that business would and could be operated by the new owners, you and Nagels, at a profit, isn't that right, sir?"

"Answer: I expected it, yes.

"Question: You expected it too, both of you did? [383]

"Answer: Yes.

"Question: And you entered into this agreement with the Nagel Company in that expectation that if you could acquire the business you could operate it and make a profit?"

"Answer: Like any other business, you can make a profit or a loss, I couldn't predict.

“Question: Well, you couldn’t predict it, true, but at the time you acquired it, or at the time you were talking with the Nagels about acquiring it together with a fifty-fifty basis, you expected that if you did so, you would make a profit from the operation of that business, that’s true, isn’t it?”

“Answer: Any transaction I make, I expect to make a profit, but sometimes I have losses, too.

“Question: But in this particular transaction, as distinguished from any transaction that you mentioned, in this particular transaction that you were to enter into with the Nagels on a fifty-fifty basis, at the time you made that deal you expected to make a profit, didn’t you?”

“Answer: This transaction is like any other transaction.

“Question: Now will you answer my question?”

“Answer: I expect always to make a profit, but like in any business, I can’t predict if we are going to finish out with losses or profits.

“Question: Well, I realize that, sir, any more than [384] any of us can predict anything, but at the time you were negotiating with the Nagels, or the two of you going in on this fifty-fifty basis—you understand what I mean, on September 20?”

“Answer: Yes, sir.

“Question: At that time you both felt that the Arizona Timber Company was being operated at a profit, isn’t that right?”

“Answer: I didn’t know.

“Question: Well, you expected that it was, didn’t you?”

“Answer: Mr. Romley, as I tell you, any transaction, business transaction that I make, I expect to make a profit, but it’s a hazard. It’s like any business, we have profits and losses.

“Question: Yes, but you don’t enter into a transaction if you think it’s going to be a loss, do you?”

“Answer: No.

“Question: You enter into those transactions that you think will realize a profit, that is right, isn’t it?”

“Answer: Any transaction I make, I expect to make a profit, like any other transaction, but it’s possible it can have a loss, too.

“Question: And in this particular transaction, you entered into it with Mrs. Nagel in the expectation and hope that you would make a profit? [385]

“Answer: I couldn’t predict prices, I couldn’t predict anything; how could I know that I’m going to have a profit?”

“Question: I’m not asking you if you knew, sir, I’m asking you if it isn’t true that you entered into this agreement with the Nagel Lumber & Timber Company in the expectation that if the purchase was consummated you could operate the business, a going business, as you say, at a profit.

“Answer: Mr. Romley, we have cost factors and we don’t know, and labor factors, and intangibles, and we never know if we are going to have profits or losses, and that is every businessman’s chance.

“Question: Well, if you had known that this business would be operated at a loss, you wouldn't have entered into a fifty-fifty deal, would you?”

“Answer: No.

“Question: That's true, isn't it?”

“Answer: Yes, sir.

“Question: So if you had anticipated or expected that this business would result in a loss if you acquired it, you again would not have entered into it, isn't that true?”

“Answer: I had——

“Question: Just please answer my question 'yes' or 'no,' and then explain it if necessary.

“Answer: Would you restate the question? [386]

“(The question was read.)

“Answer: I would have entered in it because I had timber to be cut there, and I had a substantial investment in the timber, and I had to have a mill to take care of it.

“Question: But this transaction at the time you entered into it, you expected, but couldn't predict definitely, would result in a profit to you and the Nagels, isn't that correct, sir?”

“Answer: Yes, sir.

“Question: From the operation of the concern as a going business, isn't that correct, sir?”

“Answer: I don't know.

“Question: But you expected it?”

“Answer: Yes, sir.”

That takes it through to the end of the deposition.

Mr. Moore: We object to it, I didn't object to the reading of it, your Honor, but I do object to its admissibility in evidence. I assume it is offered on the theory of an admission, but it is all predicated on the first question Mr. Romley read: "If a deal could be negotiated." And there never was a deal negotiated between the plaintiff and the defendant with reference to the operation of a going business, and the plaintiffs' evidence conclusively establishes that fact.

The Court: The objection is overruled. The portion [387] read may stand in the record.

Mr. Romley: Does your Honor have before you the questions and answers to the interrogatories? I wish to read from that.

The Court: They are here. I have them now.

Mr. Romley: Page 11 of the interrogatories, your Honor, Interrogatory No. 17. We now offer in evidence or read into evidence Interrogatory No. 17 proposed by the plaintiffs to the defendants and the answer thereto by the defendants next in order. First, as to the Interrogatory 17, at page 11.

The Court: Page 11?

Mr. Romley: Of the Interrogatories, your Honor.

Mr. Moore: He is referring to page 11 of the answers which quotes the interrogatory.

Mr. Romley: That is right. We can take it all at one time. Interrogatory 17 as it appears on page 11 of the answers to the interrogatory, am I right, Mr. Moore?

Mr. Moore: Excuse me just a moment, Mr. Romley.

(Plaintiffs' Exhibit 15 marked for identification.)

Mr. Moore: What part of it are you offering?

Mr. Romley: I am going to read the entire interrogatory and the entire answer. May I proceed, Mr. Moore?

Mr. Moore: We object on the ground that I don't see any materiality or relevancy or in the schedule attached to [388] it to any issue in this case.

The Court: Where is the schedule?

Mr. Moore: The schedule is on the back. It is marked on the bottom schedule in answer to interrogatory 17-A.

Mr. Romley: I have had marked Plaintiffs' Exhibit 15 for identification a copy of that schedule, which I will offer in evidence.

Mr. Moore: We object further on the ground, your Honor, that calls for information furnished to an insurance company for evaluation for the purpose of obtaining use and occupancy insurance. It is not material or relevant to any issue in this case.

Mr. Romley: I think the proper procedure would be for me to read the question and the answer and have counsel make such objection as he wishes so that the record may be complete.

The Court: No, I think the objection is appropriate now. The thing that bothers me is—I am reading the particulars—"Have there ever been furnished to insurance company or other organization

and so on any statement——.” Then the 17-A schedule. I don’t know what that has to do with the defendants.

Mr. Romley: This schedule 15, if your Honor please, is a schedule prepared by the defendants.

The Court: I am guessing at that, but the question [389] asked him is if any had been furnished, didn’t say by you or on your behalf and what I want to know is is there any contention that this schedule is not prepared by or on behalf of the defendants.

Mr. Moore: This schedule, if the Court please, was prepared by Mr. Cavanaugh, the comptroller, because the Court ordered us to answer interrogatory No. 17. And this calls for copies of financial statements and so forth furnished to insurance companies for insurance purposes, covering the Gallagher properties.

The Court: Well, I think I understand there is no contention it is not prepared by or on behalf of the defendants.

Mr. Moore: This was prepared—I will have to check to be certain of my answer to the Court. This particular one was prepared in response to the answer to the interrogatory, but I can check in just a second, if the Court will permit me.

Mr. Romley: I believe it is correct that at the time it was prepared by Mr. T. S. Cavanaugh, Mr. Cavanaugh at that time was the comptroller for the defendant, your Honor, on May 7, 1959, as the exhibit shows. [390]

Mr. Moore: To clarify the record, if the Court please, I am advised by Mr. Cavanaugh that this schedule that we are talking about was prepared for submission to an insurance company and was submitted and before insurance was taken out, at the direction of Mr. Liberman; the net profit shown there was cut in half and that was an estimate. But it was prepared by Mr. Cavanaugh for delivery to an insurance company agent in determining use and occupation insurability, I assume, or amount.

The Court: The objection will be overruled, the questions and the answers may be read.

Mr. Romley: Interrogatory 17 is as follows:

“Had there been furnished to an insurance company or any other organization or person for insurance purposes any financial statements, profit and loss statement, or other data covering the Gallagher properties which establish or estimate or purport to establish or estimate profit and loss, operating expense or general accounting information with respect to the Gallagher properties. If so, state for each such document the following: a. The date or dates and the contents thereof.”

The answer below: “May 7th, 1959. Contents, see schedule answering interrogatory 17-A.” Which is Exhibit 15 for identification, and which I now offer into evidence, your Honor. [391]

The Court: Well, it's already in as part of the interrogatories.

Mr. Romley: All right.

"B: The person preparing same."

"Answer: T. S. Cavanaugh, Albuquerque, New Mexico."

"C: The person to whom furnished."

"Answer: John Edsel."

"D. The person now having possession of the same or any copies thereof and the present location thereof."

"T. S. Cavanaugh, Albuquerque, New Mexico."

We next offer to read in evidence, if the Court pleases, interrogatories propounded by the plaintiff to the defendants, numbered 33 and 34 as the same appear on page 15 of the answers to the interrogatories.

Mr. Moore: We have no objection.

The Court: They may be read.

Mr. Romley: Interrogatory 33: "What timber cutting contract did defendants acquire in the purchase of the Gallagher properties?"

"Answer: See schedule answering interrogatory number 33 and 34." A copy of which, your Honor, is Plaintiffs' Exhibit 16 and I offer it in evidence.

The Court: Mr. Romley, the only objection I have to marking these, we have the answers to the interrogatories here. Actually the exhibit without the questions and the [392] answers are unintelligible, I think we are just actually getting something in the record unnecessarily. It doesn't make too much difference, but I think you have to, if

you just consider the exhibit itself, you wouldn't know what it is. You'd have to read the question and answer, and you are getting that in and it's already in as part of the interrogatories.

Mr. Romley: I take it it's not necessary to read the contents of the schedule, or exhibit into the record.

The Court: May it be stipulated that the schedules which are part of the answers to the interrogatories that the Court permits to be read, that they may be treated as though they were read in evidence?

Mr. Moore: Certainly, I don't see any necessity of encumbering the Court Reporter's record with all of them. As far as we are concerned, your Honor, I will stipulate that on this one, where I had no objection, that he may merely offer interrogatory number 33 and 34 and schedule attached answering interrogatory 33 and 34, and that that will suffice to have it in evidence for all purposes.

The Court: Very well.

Mr. Romley: Then with that understanding, your Honor, I will just read interrogatory 34, it's very brief.

"For each of such contracts," the timber cutting contracts, "state the stumpage price and the quantity of timber remaining to be cut at the date of such acquisition." [393] And the answer thereto: "Same as above," namely see schedule answering interrogatory number 33 and 34 which is contained in the answers, and also in the exhibit. Now, I

think further, if your Honor pleases, in line with what the Court has said about matters perhaps not being entirely intelligible without some further reference to other pertinent data, I think it important in connection with the interrogatory number 17 that I earlier read that I consider the prefatory note appearing on page 1 of the interrogatories in which the term "Gallagher properties" is defined because there is reference in the interrogatory to the Gallagher properties, and may that be considered as having been read in evidence, Mr. Moore?

Mr. Moore: I have no objection.

The Court: Very well.

Mr. Romley: Now, I would at this time, if your Honor pleases, like to call to the attention of the Court that Exhibit 9, being schedule A, item 2-A, referring to the uncut Gallagher Aztec under existing contracts, and 3-A, uncut Forest Service timber under existing contracts, that those items aggregate 34,087,000 square feet as shown on Exhibit—34,087,000 board feet and as answered in the interrogatories rounded off to the nearest figure they actually are 34,086,173 board feet, so it's only 127 as the testimony shows.

That then is the 2-A and 3-A identification for that exhibit taken from the answers to interrogatories 34 and 35. [394]

The Court: May I look at something just a minute?

Mr. Romley: Yes, your Honor.

The Court: Can you show me on the schedule answering 33 and 34 where the 15,000 and the 18,000 are?

Mr. Romley: The Forest Service comprises, on the schedule, your Honor, the Promontory unit and the Duran unit. The Promontory unit is shown as 14,429,230 and the Duran, 4,422,390. Those come to the 3-A item of 18,852,000. I believe that's correct.

They come exactly to 18,851,620 rounded off to 18,852,000.

The Court: I see them now. The 15,000,000 is the two Aztec figures?

Mr. Romley: That is correct, your Honor, yes. The Gallagher Aztec.

Mr. Moore: The only objection that I have to that, your Honor, those figures are correct as of the date of the execution of the contract November 6th, 1958. They are not correct as of January or March, whenever it was that the plaintiffs say they attempted to exercise an option. And furthermore, in Mrs. Nagel's deposition which I will offer later—the exact page and number I can't recall—that she testified that she would not be entitled under her interpretation to any profits prior to the time that she actually attempted to exercise her option. That's my [395] recollection in substance. I want to make clear these figures are correct as of November 6th, but they are not correct as of the time the plaintiffs' rights, if any, attach.

Now, we can, we do have—I don't have it at my fingertips, but we do have available information

which I can, I believe, dig out so that we could stipulate with Mr. Romley as to the exact footage as of March 1st, 1959.

That is exact footage of remaining timber that was acquired to be cut. It might be that we could work it out, but I haven't worked out in January because——

Mr. Romley: May I inquire of counsel if his figures will show what had been cut between November 6th, '58, and December 23rd, '58, when Mr. Jenkins first sought to get the information upon which he would exercise or decline later to exercise his option?

The Court will recall on December——

The Court: Well, I think we are getting into something here that is——

Mr. Romley: We probably can cover by stipulation.

The Court: I don't think you can get two different theories, and you are supplying the figures that you think fit your theory and I'm sure Mr. Moore is going to supply the figures that he thinks. Actually we have got kind of a three-step question.

First: Is the Court going to find or hold that there [396] is any legal basis for recovery of any profits?

Second: Were there any profits to be recovered?

And then the third, what were those?

And necessarily the third one is always something that each side has to do its very best and put its contentions in, and the Court has to then try to solve it justly if you get that far from the respec-

tive contentions of the parties. I can say right now that if I was going to wait for you two men to agree on a set of figures it couldn't be done, because your fundamental theories are different.

Right away Mr. Moore wanted to get something into January and you want to go back to November. And that's where the difference would be. I think we'd better let you each go ahead and present your figures that you contend will support your theory.

Mr. Moore: Subject to the objection I made, your Honor, the figures as of November 6th are correct.

The Court: The record may show your objection and it will be considered as and when Exhibit Number 9 is offered.

Mr. Romley: If the Court pleases, now, I appreciate that this exhibit I am about to refer to is in evidence, Plaintiffs' 6. And I am reading from it only for the purpose of making the point as a basis for an offer at a later stage of Exhibit 9. I have Exhibit 6, perhaps your Honor would like to see that. We will dig out our copy. It is the so-called [397] pooling agreement dated July 30th, 1957. I merely direct the Court's attention to the recital therein appearing over the signature of the defendants as well as the Arizona Timber Company, that Duke City on that date was the owner of 62,505,000 feet log scale of timber which, with regard thereto, I think that perhaps we can stipulate—I spoke to counsel this morning about it—

that that 62,505,000 feet of timber, net log scale, was timber that, on that day, July 30th, 1957, was Aztec timber owned by the defendants.

Am I correct, Mr. Moore?

Mr. Moore: That's correct.

Mr. Romley: And further that with regard to that 62,505,000 feet of Aztec timber, none of it had been cut prior to November 6, 1958.

Is that correct, sir?

Mr. Moore: Now, we are getting into a very peculiar situation, if the Court please. This agreement that Mr. Romley has referred to constitutes either a pooling agreement or an exchange of an undivided one-half interest of the defendants' timber for, in exchange for or for an undivided one-half interest in an equivalent amount of timber owned by the—the contracting party, I believe, was Arizona Timber Company. The only factual thing that I think is true, and I don't want to belabor what the facts are, I have serious debate with the legal interpretation which Mr. Romley is coming to. [398]

The facts are that as of November 6, 1959, under another agreement, the milling agreement, August 9, 1957, a certain number of feet of timber had been cut. This pooling agreement provides that notwithstanding the exchange in ownership, each party would be required to pay, would be required to make all payments and meet all obligations with respect to the timber or timber cutting rights of

which it was the owner prior to such exchange. [399] The timber that was cut was timber which Arizona Timber Company was obligated to make the payments, the 62,505,000 feet of Aztec timber that was involved in this exchange and pooling agreement theretofore owned by Duke City Lumber Company and under this agreement Duke City Lumber Company remained obligated, according to the last paragraph, that had not been cut on November 6th, 1959. Those are facts and I stipulate to the facts, but when we get to the legal conclusions he is coming to on Exhibit 9, that is when we part our ways.

Mr. Romley: May I suggest this, if your Honor please, for the purpose of our discussion here or offer here and to make clear exactly the stipulation, that we consider for the moment that the 62,505,000 feet of Aztec timber on July 30, 1957, as belonging to Duke City, we agree are located on "X" acres and a comparable number of actually 65,000,000 as recited later, owned by Arizona Timber Company, are located on "Y" acres. Can we with that understanding stipulate that none of the timber, the Aztec timber located on "X" acres that on the date of July 30, 1957, were owned by Duke City, that none of that timber had been cut prior to November 6th, 1958?

Mr. Moore: I think that is what I said, Mr. Romley, that is what I tried to. That 62,505,000 feet of Aztec timber formerly owned by Duke City was in existence as standing timber on November 6th, 1959. [400]

Mr. Romley: '58, you mean?

Mr. Moore: '58.

Mr. Romley: May we stipulate further that none of that Aztec timber on "X" acres had been cut prior to January 6th or 7th, 1959; as a matter of fact, prior to the end of March, 1959?

Mr. Moore: If that is true, I would stipulate, but I don't know. I would want to check before I would stipulate to that. If it is a fact I will stipulate to it, but I do not know.

Mr. Romley: In this connection, if your Honor please, I call the Court's attention to the fact items on Schedule 9, or Exhibit 9 for identification, 1-A and 2-B aggregate this figure of 62,505,000 feet on "X" acres. With regard to item 3-A, Mr. Moore, can we stipulate that as of December 15, 1958, Duke City had cut and removed from "Y" acres 18,852,000 feet of pine timber from those Aztec lands?

Mr. Moore: Why the "Y" acres?

Mr. Romley: "Y" is the Gallagher Aztec.

Mr. Moore: I would have to check, your Honor, with these figures and their contracts and so forth. It isn't a question I am requiring a waste of time, but I want to be certain of the facts before I agree.

The Court: Would it accomplish anything if we recessed now and counsel got together to see what they [401] could stipulate?

Mr. Moore: I don't think there is any doubt but what we can stipulate as to the given amount of timber at a given time, but it is something I want to check before I do.

The Court: Suppose we try it. We will recess now until 1:30.

(Noon recess.) [402]

May 5, 1960, 1:30 O'Clock P.M.

Mr. Romley: If the Court pleases, we were able to agree only in part on a stipulation. I think we might save time instead of trying to stipulate on that matter if I just make my proof on it.

The Court: All right, fine.

Mr. Romley: Mr. Cavanaugh.

THOMAS CAVANAUGH

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Will you state your name, please, sir?

A. Thomas Cavanaugh.

Q. Where do you live, Mr. Cavanaugh?

A. Albuquerque, New Mexico.

Q. And what is your business or profession?

A. I am comptroller for the Duke City Lumber Company.

Q. How long have you been the comptroller for that company?

A. Since March of 1958—March of 1959.

Q. Prior to that time what was your employment? [403]

(Testimony of Thomas Cavanaugh.)

A. I was employed as comptroller of the New Mexico Timber Company for about eleven years.

Q. That would be from '47 or '48, thereabouts, until '59? A. From '48 to '59.

Q. '48. In that capacity from about '48, '49, thereabouts, did your duties cover the operation of the Winslow plant by the so-called Gallagher-Kaplan interests? A. Yes, sir.

Q. Mr. Cavanaugh, do you know the amount of Aztec timber which Duke City owned on July 30th, 1957, which was situated in the Sitgreaves National Forest?

A. Yes, it's 62,000,000, about 500,000 feet.

Q. Would your memory be refreshed by reference, so that we can have exact figures, sir, to the so-called pooling agreement which I think is Exhibit 6 in evidence in this case?

A. Yes, that's right, 62,505,000 feet.

Q. All right, sir. Now, was any of that 62,505,000 feet of Aztec timber cut prior to, say, April 30th, 1959? A. No, sir.

Q. Not any of it at all. That's true, is it not?

A. That's true.

Q. Have you seen the deposition of Maurice Liberman which was taken on December 5th, 1959, and completed on December 21st, 1959? [404]

A. Yes, sir.

Q. Have you read that deposition?

A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. At whose request?

Mr. Moore: We object to that, if your Honor please, it's wholly immaterial.

Mr. Romley: All right, I agree.

Q. (By Mr. Romley): Do you recall this statement in that deposition, sir?

Mr. Romley: I'm reading from page 46, Mr. Moore.

Mr. Moore: I object to the use of a deposition in this manner, if your Honor please.

Mr. Romley: Well, I will read the answer in evidence as an adverse party, your Honor, to lay the foundation for further questioning of this witness.

The Court: No, this is Mr. Liberman's deposition?

Mr. Romley: Yes, your Honor. I want to read a sentence to lay a foundation for a further question of this witness just as this morning we read other parts of his deposition as an adverse party.

The Court: Well, you are not reading it to me, you are reading it to the witness, do I understand that?

Mr. Romley: I want to read it into the record now since counsel has objected to my using it.

The Court: I see, for the record? [405]

Mr. Romley: Yes, for the record. At this time for the record, if the Court pleases, we will read into evidence the testimony of Maurice Liberman

(Testimony of Thomas Cavanaugh.)

as an adverse party as an admission against interest, the following answer appearing on page 46 on lines 22 and 23.

Mr. Moore: Your Honor, we object under the rules. Under the stipulation our objections were reserved. We object to that answer being read as an admission or for any other purpose for the reason that the questions call for a legal conclusion and an interpretation of a complicated contract, as it worked out. And for that reason it is not admissible as an admission or otherwise. The answer is with reference to owing timber.

Now, we'd get at the facts of what happened, and then it's a legal conclusion of whether anybody owed timber or owed money or what they owed, and to whom it was owed.

The Court: Well, you may develop that with Mr. Liberman but I believe the objection must be overruled. I will have to ask the Clerk to mark this. This is volume 1 of the deposition of Maurice Liberman, mark that for identification, please.

(Plaintiffs' Exhibit 17 marked for identification.)

The Court: May I see 1 in evidence, please? All right, Mr. Romley.

Mr. Romley: Very well, your Honor. I'm reading from, [406] for the record, from Plaintiffs' 17 for identification, the deposition previously referred to, line 22 and 23 on page 46, this answer by Mr. Maurice Liberman:

(Testimony of Thomas Cavanaugh.)

“Answer: As of September the 20th, 1958, yes, I owed the Gallagher interests for 14,000,000 feet.”

Q. (By Mr. Romley): Mr. Cavanaugh, I believe you said that you read this deposition?

A. Yes, sir.

Q. You read that statement?

A. Yes, sir.

Q. As of December 1st, 1958, do you know if that statement of 14,000,000 remained the same as to the number of feet involved or whether it changed in any way?

Mr. Moore: We object to that, if your Honor please. Certainly that's inadmissible to ask this witness what this answer meant or referred to and whether it remained the same.

The Court: The objection is sustained.

Q. (By Mr. Romley): Mr. Cavanaugh, at the time of the sale by Gallagher and Kaplan to Duke City, I take it from your testimony you were still the comptroller for Gallagher? A. Yes, sir.

Q. In that capacity did you prepare a statement to show the amount of timber, Aztec and Forest Service timber that had been cut under the pooling agreement that is Exhibit 6 in evidence?

A. Yes, sir. [407]

Q. You have a copy of that statement here, sir?

A. Yes, sir.

Mr. Moore: Your Honor, we offered to stipulate to all those facts, exactly what is shown on this exhibit.

(Testimony of Thomas Cavanaugh.)

Mr. Romley: You did not, sir.

The Court: Let's go along.

(Plaintiffs' Exhibit 18 marked for identification.)

Q. (By Mr. Romley): Tell us what this Exhibit 18 for identification is, sir?

A. This is the net log scale of timber cut under the pooling agreement between Duke City Lumber and Arizona Timber Company up to December 1st, 1958.

Q. When was this Exhibit 18 prepared?

A. I prepared the exhibit I think probably about January of 1959.

Mr. Moore: He is talking, Mr. Cavanaugh—

The Witness: Oh, today.

Q. (By Mr. Romley): Today. Do you have the paper you prepared in December of 1958 or January, 1959? A. Yes, sir.

Q. May I see that?

A. I will have to get down and get them out of my papers.

(Plaintiffs' Exhibit 19 marked for identification.)

Q. (By Mr. Romley): Is Exhibit 19 the photocopy, I think you call it Thermofax copy, of the original of the [408] statement you prepared in December of '58 or January of '59?

A. Yes, sir.

Q. Does that statement reflect the amount of timber that was cut under the pooling agreement of July 30, 1957, I believe it is 6 in evidence?

(Testimony of Thomas Cavanaugh.)

A. Yes, sir.

Q. Can you tell us the total number of board feet that was cut under that agreement, please?

A. The total number of board feet, and this is on that log scale was 34,181,000 feet.

Q. 34,181? A. 181.

Q. Net log scale. Do you know where that timber was cut from with reference to the timber that on the date of the execution of the pooling agreement was located on either Duke City property or Gallagher property?

A. It was all cut from the Gallagher property.

Q. All cut from the Gallagher property. Does the statement 18 show the amount of that timber that Duke City took into its possession and sold or otherwise disposed of? A. Yes, sir.

Q. Will you tell us how much that was, sir?

A. Duke City received 19,118,000 feet.

Q. And this all came from the lands on which the Gallagher timber stood? [409]

A. Yes, sir.

Q. Of that 19,118,000 feet was any of it Ponderosa pine?

A. 18,450,000 feet was Ponderosa pine.

Q. We are still speaking of net log scale?

A. Yes, sir.

Q. And the remainder, the difference between these two latter figures comprise another kind of timber?

(Testimony of Thomas Cavanaugh.)

A. 489,000 feet was Douglas fir and 179,000 feet was white fir.

Q. Does the figure of 19,118,000 have any relationship to the 14,000,000 feet referred to in the answer given by Mr. Liberman in his deposition, which I read into evidence a while ago?

Mr. Moore: I object again for the same reasons, if your Honor please.

The Court: Objection sustained.

Q. (By Mr. Romley): Do you know, Mr. Cavanaugh, if any additional timber was cut under the pooling agreement, 6 in evidence, after September 20, 1958 and prior to December 1 of the same year?

A. Yes, sir.

Q. Was there? A. There was.

Q. Can you by reference to Exhibit 18 tell us how much additional was cut? [410]

A. No, I can't. I have no records as of September or October or any period in between.

Q. Or November? A. Or November.

Q. I believe these figures you gave us earlier of 19,118,000, 18,450, 489,000, 179,000, were all as of December 1, is that right, or December 15th?

A. November 30th really, end of the calendar month.

Q. Will you refer to 18 again to refresh your memory and tell us if it wasn't as of December 15th rather than November 30th. Do you have 18 there before you, or 19?

(Testimony of Thomas Cavanaugh.)

A. It is 19, but actually we cut off our logging operation on December 1st and cut off sawmill operation on December 15th, so I had to figure our inventory and everything up through December 15th, but the net log scale is as of November 30th or December 1st.

Q. Then these figures I just last read are as of November 30th, 1958? A. Yes, sir.

Q. I will ask you, sir, to assume for the purpose of this question that as of September 20, 1958, Mr. Liberman, as he testified, owed or Duke City owed the Gallagher interest for 14,000,000, and ask you to take that assumption into consideration with your testimony with regard to the figure of 19,118,000. If you were to assume [411] and take into consideration the figures I have just mentioned could you then state to the Court the amount of timber that Duke City took under the pooling agreement from timber that was standing upon the Gallagher property?

Mr. Moore: We object to that, if your Honor please. I don't see any relevancy to it. I don't know what we are driving at, what was delivered to Duke City from September 20th to December 1st. It is assuming legal conclusions that I do not think are justified under the facts and the law; furthermore, I don't understand the question.

The Court: I don't either but we will see if the witness does.

Q. (By Mr. Romley): Do you understand the question?

(Testimony of Thomas Cavanaugh.)

A. I understand the question. The only thing is that I don't think we had any exact figures for the 14,000,000 feet so I couldn't say what is cut from the previous figure.

Q. Let me ask you this, sir. Assume for the purpose of this question that Duke City on September 20, 1958, owed the Gallagher interests for 14,000,000 feet, approximately that amount, do you have any information that will disclose how much more than that figure or less, if it is less, Duke City owed on November 30, 1958?

Mr. Moore: We object to the question, if your Honor please, assuming, it says assuming Duke City owed for 14,000,000 feet. Owed what, how much, when and in kind or what? [412]

Mr. Romley: I think perhaps I could go into it in a little more detail.

The Court: Very well.

Q. (By Mr. Romley): When you read this statement of Mr. Liberman in his deposition in which he said that as of September 20, 1958, he owed the Gallagher interests for 14,000,000 feet, did you because of your acquaintance with the matter know what was meant by that statement?

Mr. Moore: We object, your Honor.

The Court: He may answer.

Mr. Moore: This man's interpretation of an answer in a deposition which calls for a legal conclusion.

(Testimony of Thomas Cavanaugh.)

The Court: No, he may answer. The question is not what he understood what was meant by it, but if he knew what was meant by it. He may answer that.

A. I didn't understand what was meant. I mean, I knew we were both cutting out of a common pool. At that time Duke City was cutting out of the pool on timber that Arizona Timber had purchased, so sometime sooner or later Duke City was going to have to buy the timber and Arizona timber would get the free timber from the pool, but as to whether each owed the other, I don't know.

Q. You do know that Mr. Liberman acknowledged in this deposition in this statement that he did owe that 14,600,000 feet? [413]

Mr. Moore: We object to that, if your Honor please.

The Court: He testified he read the deposition.

Mr. Moore: Yes.

Q. (By Mr. Romley): Did you read the, I think Exhibit 1, the letter of September 12, 1958, that Mr. Liberman signed or have you ever seen it before, sir? A. Yes, I have.

Q. Let me hand that to you, sir. When did you read it?

A. I don't remember exactly, but it was after we were provided a copy of it, I believe.

(Testimony of Thomas Cavanaugh.)

Q. Do you notice there the statement on page 2, paragraph 2 of the letter addressed to Mr. Liberman and signed or containing this language, among other things, over the signature of Mr. Liberman—did I say addressed to him by Mr. Gallagher—addressed to Liberman by Gallagher, and on page 2: Your company owes Arizona Timber Company approximately 14,000,000 feet of stumpage; and on the last page, agreed to and accepted under certain conditions with the signature of Mr. Liberman, is that right? A. That is right.

Q. Were you present when that agreement was signed? A. No, sir.

Q. I say agreement, I mean this letter?

A. No, sir. [414]

Q. Was it discussed in your presence?

A. No, sir.

Q. You have told us you do not know how many feet of timber were cut under the pooling agreement between September 20 and November 30, 1959; by that I take it you mean you don't know the exact number of feet that were cut, is that right?

A. That is right.

Q. Do you know approximately, sir?

A. I didn't understand your question again—

Q. Do you know approximately the number of feet that were cut under the pooling agreement and delivered into the possession of Duke City? [415]

Mr. Moore: When? From what dates?

Mr. Romley: Yes, sir, you're right.

(Testimony of Thomas Cavanaugh.)

A. The reason I didn't understand is whether you meant from just Duke City alone or from both.

Q. (By Mr. Romley): I mean my question from September 20th, 1958, to November 30th of the same year.

A. For Duke City?

Q. How much Duke City took of that cut?

A. I'd have to estimate it was around 5,000,000 feet.

Q. Was it the difference between this 14,000,000 and the 19,118,000?

A. Yes, sir.

Mr. Romley: That's all.

Cross Examination

Q. (By Mr. Moore): Mr. Cavanaugh, at the time that you were cutting out of that pool was the Aztec timber which Duke City Lumber Company had owned prior to the pooling agreement accessible and were there roads to it?

A. No, sir.

Mr. Moore: That's all.

Mr. Romley: That's all. If the Court pleases, at this time we offer in evidence Plaintiffs' Exhibit 9 for identification. I think that if the Court wishes any statement [416] on my part I'd be glad to try to tie these figures in, but I think that they are self-evident from all of the testimony that has been received, I think.

Mr. Moore: Well, we object, if your Honor please, for the reasons that there is no evidence upon which to base the net lumber recovery, in fact the record evidence disproves it. There is no

evidence in the record to support the calculation under 3-B to be cut under future contracts. There is no evidence in this record that Duke City ever will have any future contracts. For example, in the note at the bottom it includes a contract to be awarded May 31st, 1960. And then it includes contracts to be awarded up to, for cutting up to 1973. This is like gazing into a crystal ball. There is no evidence that Mr. Liberman will be in business, there is no evidence that he will operate that mill, there is no evidence which you could draw an inference from that he will be in operation in 1973.

Furthermore it is the foundation for another exhibit based upon a milling contract wherein they assume that the Duke City Aztec timber would have gone through this mill had they purchased it, and after Mr. Liberman purchased a half interest in it he would have then contracted with the plaintiff to mill it on the same terms of the milling contract which was terminated in the November 6th, 1958 contract.

The Court: Well, you said that the other day, [417] Mr. Moore, and I looked at that and I didn't see where it was terminated.

Mr. Moore: I think it is.

The Court: But I think what is misleading us all here is that these are gotten up like exhibits and they are really arguments is what they get down to.

In other words, counsel has certain facts that are established by the evidence such as that Duke City had certain timber. Therefore, he says it's a fair argument or assumption that owning a half interest in the mill he would send the timber there.

And then we have the Forest representative the other day who told what timber would probably be available from that mill in the future and counsel is assuming or arguing that it's a fair inference that Duke City would have gone out and got its proportion of that in the future, and then being interested in the mill would have milled it there.

But isn't that what you usually get into in these lost profits?

Mr. Moore: I think if you have the basis, a legal basis for any contention that there is a prima facie case made for damages looking to the loss of future prospective profits, yes, you get into it. But the point is, your Honor, that has not been made here in this case.

The Court: Well, I am not saying it has either but I [418] am not in the position of making up my mind about that. As I said before we have got: first, is there any basis, or have the plaintiffs shown a right to any loss of profits? I say that they have some evidence that upon a study and after hearing argument I may come to the conclusion that they have, I may come to the conclusion they have not. If so, then loss of profits is at an end in this case.

Next, if we reach the point where I decide that they have shown a basis for recovery of loss of profits, then have they established it? That's the next question.

So the thing—what I would want to know, I would want to know from counsel and I treat it as argument, I mean insofar as I would want to know where he gets or how he calculates this figure of \$135,205. I think I could see where he is drawing the other figures from, and I would like to hear from him on that before receiving it.

Mr. Romley: With regard to this latter item, your Honor, that 135,205,000 feet of timber, net log scale, that is arrived at as shown below and this was not intended as an argument, rather as explanatory of the items appearing above. The evidence shows from Mr. Kirkpatrick that a contract is in the—well, is being noticed now, that it has in effect been tailored to meet the needs or requirements of Duke City.

Mr. Jenkins says, "We are not going to bid on it." The only other available bidder is Mr. Liberman. [419]

The Court: Well, you are inferring then that Duke City will end up with it, that's what I mean.

Mr. Romley: Yes, your Honor, from the testimony on his part which we read in this morning, he bought this mill. The two of them were figuring on buying the mill together to operate, they weren't going to buy it and shut it down. They were going to go in business to make a profit as he said.

And then we take those figures, arithmetically they would come to this: We take the amount to be awarded under this first contract which is 26,800,000, to expire in December of 1952. Then from '53 through '68 we take the projection of the Forest Service of one-half of the 21,000,000 available to the two mills, that's the 10,500,000 for each.

Then, although Mr. Kirkpatrick said that our projections show 18,161,000,—I believe it was 63—it was 18,163,000 he said would be available under their projection of the management plan for 20 years after the end of 1956.

We have projected it for only 5 years. We have tried to be on the conservative side in these computations, and taking one-half of that 18,163,000 came to 9,081,500, which we rounded off to the 9,081,000, and multiplied that by the 5 years, '69, '70, '71, '72 and '73 and we came up then with the total for that period of 108,405 plus the 26,805 making the total of 135,205 of net log scale to be cut under contract that are not yet in existence, and that is why we determine [420] then under future contracts.

I think the evidence is such that the Court can, and we believe, although I wouldn't argue it now, should reasonably conclude that this mill having been bought for the purpose of operation and not to be shut down, that the man who acquired it or that the people who we contend should have ac-

quired it would have operated it and would have bid and would have gotten the timber and milled it and made their profit.

The Court: It will be received and the Court will give it the weight that it deems it to be entitled to when we finally get all of the evidence in the case.

(Plaintiffs' Exhibit 9 received in evidence.)

Mr. Moore: Your Honor, in response to the Court's statement that you did not find in the contract, and I'm referring to the purchase contract of November 6th, 1958, I don't recall the exhibit number.

The Court: It's Exhibit 4.

Mr. Moore: Exhibit 4, page 16 specifically and expressly terminates the milling contract. Paragraph 10, your Honor; I don't know whether the paging is the same.

Paragraph number 10 starts out: "As of December 1st, 1958, or upon the termination——" and so forth. The contract referred to there is the milling contract of August 9th, 1957.

Mr. Romley: If the Court please, with regard to the statement last made by counsel, the fact that the contract provides for a termination of the milling contract does not [421] avail the defendants anything for these reasons: First, it is the testimony of Mrs. Nagel that Mr. Liberman said to her, when they were discussing the matter of milling his future—his Aztec timber, "Well, why change that?" Referring to the pooling agreement.

Assuming he had the right to terminate it, said, "Why change it?" which means simply that it would be milled on the same basis it was being milled.

Second, if it didn't mean that it meant that it would be milled the same as any other timber would be milled, and the mill would have made a profit on that which exceeded the amount that he was required to pay under the milling agreement. So it is to his advantage that it be treated as the plaintiffs have treated it in this case.

Then I might add further, if your Honor pleases, that so far as the right to terminate it is concerned, I don't believe that any contract that he made terminating that could affect the rights of the plaintiff under the agreement as testified to by Mrs. Nagel that the parties had with regard to milling. He might have agreed with Tom Gallagher to terminate it, but as it was Mr. Liberman and Mrs. Nagel it could not be terminated.

The Court: Well, this is the contract that Mrs. Nagel or the Nagels are claiming under—

Mr. Romley: She says it is a good contract, that's right. [422]

The Court: And she will have to take it, won't she, with the termination that is in it?

Mr. Romley: Yes, your Honor. And in that event as I point out this lumber, this timber belonging to Mr. Liberman would have to be milled. It's not going to be milled for free, there is no contention that was ever to be done.

The Court: We are going again to the inferences.

Mr. Romley: Yes.

Mr. Moore: I just wanted to direct the Court's attention to that paragraph because you had asked about it.

The Court: Very well.

Mr. Romley: If the Court pleases, at this time the plaintiffs offer in evidence Exhibit 10 for identification which was also identified as Schedule D.

Mr. Moore: Well, we object to that, if your Honor please, for the reason that the evidence is clear in answers to questions the Court asked the accountant this morning that these figures are erroneous because of interest payments, bad debts, other items that are not included.

The Court: Well, it will be received on the same basis, the Court will give it the weight, if any, that it feels it's entitled to.

(Plaintiffs' Exhibit 10 received in evidence.)

Mr. Romley: We next offer, if the Court pleases, [423] Exhibit 11 for identification which also has the name Schedule C.

Mr. Moore: If the Court please, I assume Mr. Romley is going to offer all of them and in the sake of saving time I make the same objection to them, they are based on speculation, there are errors in them, they are not correctly calculated, the foundation is not present upon which to base the calculations.

The Court: Well, I have studied this. The only questions that I have were the reference to the office building and equipment. Both the figures for not to be replaced and to be replaced, as I recall the only testimony as to life we had was from Mr. Jenkins with reference to the office building. I don't recall any testimony with reference to the equipment and its life. I assume from what's down below it, it has a six-year life, but I don't recall any—

Mr. Romley: I believe your Honor is correct, I don't believe I asked—I did ask him about the life of the office building, but I didn't ask him about the life of the equipment, I think that's correct.

The Court: I didn't have it in my notes and that's the part of it that to me is unsupported.

Mr. Romley: The exhibit assumes it has a life of three years. I don't think he said that, however, because it's included in what is to be replaced at the end of three years [424] and then again at the end of nine years. I don't think he testified about that.

The Court: That would mean a life of six years, would it not?

Mr. Romley: Well, a remaining life on the existing equipment of three years and then a life on the equipment to be replaced at six.

The Court: Just the same as it is on the—

Mr. Romley: The same as on the spacers—no, the same as on the carriers and lift trucks.

The Court: Yes.

Mr. Romley: And the controls, pickup trucks, trailers, et cetera, I think that your Honor is correct and I should get some evidence as to equipment, although we might fall under the deminis non curat lex rule, I don't think we should urge that now. I will put on other evidence in that.

Well, I suppose before I proceed, your Honor, with reference to offering the others,—

The Court: Well, I will receive 11 for—

Mr. Romley: Subject to that being connected up?

The Court: Yes.

Mr. Romley: Very well.

The Court: And for what it's worth, what I decide it's worth upon studying it.

(Plaintiffs' Exhibit 11 received in [425] evidence.)

Mr. Romley: Now, if the Court pleases, we offer in evidence Plaintiffs' Exhibit 12.

Mr. Moore: Well, we have the same objection to that, if your Honor please, with the additional objection that under paragraph number 1 I don't think there is any foundation, but I think that those figures are taken out of the milling contract and your Honor just read the contract of November 6th, 1958, which terminated it. And now this throws it clear off base and further on the ground that it is in error on its face in that the depreciation set forth was not expressed over in the calculations the 50,000,000 feet shown under paragraph 1.

The Court: Well, again it will be received for the weight the Court finds it will give to it upon considering the entire evidence.

Paragraph 1 is probably based upon the assumption that as far as the joint project was concerned they would go on and mill this timber at the same basis, although the Gallagher contract had been terminated. I mean it's on that assumption, that is an assumption.

Mr. Romley: Yes, your Honor.

The Court: And on the basis of that—

Mr. Moore: May I observe, your Honor, that that's a contract that was never made?

The Court: No, all of these things relate to—when you get to future profits all of them are things that [426] didn't happen, they are things that we infer and expect will happen and when you get through, the rule very simply stated that the real interest is in establishing a loss of profits and when you have done that then each side does its best to show how much or how little, and that's all that can be done because you are in the realm of the future and of sound speculation.

(Plaintiff's Exhibit 12 received in evidence.)

Mr. Moore: The fact of damage, your Honor, must be established and that must be based upon evidence to show breach of an agreement, that's the point I mentioned. I don't want to waste the Court's time.

The Court: Oh, I misinterpreted your remarks.

Mr. Moore: I'm talking about this future milling.

The Court: I realize, Mr. Moore, that as far as you are concerned, we could stop right now on the matter of loss of profits.

Mr. Moore: You don't even need to start.

Mr. Romley: I think your Honor ruled on 12, did you not?

The Court: I did.

Mr. Romley: We next offer in evidence, if the Court pleases, Plaintiffs' Exhibit 13 for identification. Oh, I might say this: I recognize now I still don't have any proof on the right percent, and I have a witness who is available [427] in the morning to testify on that since there is just a dispute between counsel as to what it should be. But subject to that being connected up, because my next witness may have occasion—I'm not sure now, but he may have occasion to refer to these exhibits, that's why I'm putting them in now subject to my proof.

The Court: Well, let's withhold action on it until we get the testimony.

Mr. Romley: Very well. Mr. Smith, will you step forward, please, sir.

KENNETH SMITH

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Will you state your name, please, sir? A. Kenneth Smith.

Q. Where do you live, Mr. Smith?

A. Atherton, California.

Q. That is near San Francisco, is it?

A. Right.

Q. How long have you lived in California? Just approximately? [428]

A. Twenty-four years.

Q. Twenty-four years?

A. The second time.

Q. How old are you? A. Sixty-seven.

Q. And what is your business or profession?

A. Economic consultant.

Q. How long have you engaged in that profession, sir?

A. Two years this time and five years in the 1930's.

Q. Will you relate for us, please, Mr. Smith, in a brief way what your experience has been in the business world?

A. It's a little difficult to make it brief. But I started January 2nd, 1911 as a stenographer for the Carter Lumber Company in Houston, Texas. From 1912 to 1919 with the Long-Bell Lumber

(Testimony of Kenneth Smith.)

Company in Beaumont, and two years as the manager opening and operating the first distributorship for the White Truck Company in Tampico, Mexico.

Then I began with the Long-Bell Lumber Company in New Orleans, San Francisco, and Philadelphia as District Sales Manager until 1926.

'26 to '29 general sales manager of the E. K. Wood Lumber Company in Los Angeles; '28 to '31 organized and operated a retail lumber association in Los Angeles; '31 to '36 ran a business consultant service in Los Angeles; '36 to '40 was general manager of the Lumber and Allied Products [429] Institute, a retail association, in—retail lumber association in Los Angeles; 1940 to '48 I was president and manager of the California Redwood Association in San Francisco, a manufacturers' association of redwood lumber and during that period of time I opened for them and maintained throughout the War in Washington a service office for the members of the association which handled all of their relations with the Government of every kind, price, rationing, wages.

And 1948 I became vice president and treasurer of the Pacific Lumber Company and was there until I retired because of running up against mandatory retirement in February, 1958, and then resumed my previous practice as a consultant in San Francisco.

(Testimony of Kenneth Smith.)

Q. Mr. Smith, can you tell us what experience you have had in these various capacities that you have mentioned in the production of timber, in the lumber and in acquainting yourself with production costs and other cost items?

A. Well, my earliest experience was pushing lumber up to a planer and scaling in the woods in Louisiana, and in Los Angeles in that experience there I handled all of the labor relations and for about five years all of the estimating for about 180 yards, and in the course of that learned intimately all of the costing of planing mills and custom mills making sash and doors and things of that nature. [430] And in the cost of running a retail operation in estimating all of the house bills and all of the estimates for lumber of those 108 yards which involved the cost of operation and price of merchandise, and then in my capacity with the Redwood Association in San Francisco, representing them in Washington, I had the complete operating statements and compilations and composites for all of my dealings with the Bureau in Washington on both price and production controls. After that I moved over to the Pacific Lumber Company where part of my duty was not only all of those costs and sales, but I had direct responsibility for the sales of their production and amounted to about 16 carloads a day and \$20,000,000 a year. I had responsibility for the comptroller work and all of the

(Testimony of Kenneth Smith.)

accounting, responsibility for credits, responsibility for running the subsidiary companies which involved two retail lime yard concerns, responsibility for other subsidiaries, for such extraneous things as water companies. And in the course of that I analyzed for them all of their purchases and sales or projected purchases and sales, amounting in total to somewhere between 10 and 12 million dollars, analyzing the costs, the potentials, the possible profitability of all of those proposals that were offered to our company, which was in a buying position. Also negotiated and made all of the analytical studies before and the operation of the company afterwards in some sales of a very substantial nature that [431] were consummated at the same time going into millions of dollars.

Q. Has most of your work been in the lumber field?

A. With the exception of two years in Mexico in 1921 and the outside work, the work outside the industry which I did as consultant in Los Angeles, '31 and '36, and have done since 1958 here, it has all been in the lumber business. I have had some work both times as a consultant outside the industry, however, in both instances my work was primarily inside the lumber industry, because that was where I was acquainted and had the most potential for clients.

Q. Have you made any studies of the availability of timber in this country?

(Testimony of Kenneth Smith.)

A. For a great many years, because it is essential in purchasing large timber properties and lumber properties to make some projections for the future. For our own company where we owned over four billion feet of timber, it was necessary to make projections practically in perpetuity to decide what to do about putting the entire property on a sustained yield basis. Since I was a consultant I have had employment three times in Arizona for the Navajo tribe of Indians, which involved projecting for them not only the timber situation, but the marketing possibility for lumber, as the consideration for justification of putting in an operating property on their timber holding. I don't know [432] whether it is of interest to mention it here, last year I did quite a similar job of analyzing the market and making an economic projection and feasibility of operating for a much larger property on the island of Formosa for the Chinese Government.

Q. Have you made any studies, Mr. Smith, of the market situation as it exists—first, just that far, then I will ask you about any projections.

A. You mean the overall market in the lumber—

Q. Industry I am speaking of.

A. Made a great many of them, because it has been a subject that has been of concern not only to myself, but everybody in the lumber industry

(Testimony of Kenneth Smith.)

for a good number of years. It is basic to the study of handling of timber properties on a sustained yield basis and the decision whether to handle property on a sustained yield basis or cut them out, as to what the long range future will be. The decision of the industry as an industry, not as to all the individuals, has been to move the industry over to a sustained yield basis rather than cut out the existing stands of timber and quit producing. That is evidenced by the fact that in the fifteen year period since the first tree farm was dedicated it has moved up to where on the latest figure some 52 million acres and approximately 27 per cent of all the timber held by private owners, except farm holdings, is now dedicated tree farms [433] on a sustained yield basis. The effect of that has been—it has been apparent now for about since the war, some 12 or 13 years—been apparent to students of the timber business in the United States that the virgin timber owned by private operators was being cut down in its availability for cutting into lumber by the withdrawal to put it into tree farms, by the general reluctance of the owners to cut timber at any time in excess of the sustained yield or actual growth of their properties, with the result that nobody goes out any more and cuts two or three shifts in a boom market, as it used to be was traditionally the practice in the industry until about 15 years ago. They cut just what they are

(Testimony of Kenneth Smith.)

set up to cut. And that has had the effect of putting a ceiling on the total availability of lumber in the country, a rather unusual situation as, say, compared to the manufacture of automobiles where they can make any number they can sell. The industry in the past ten years has not exceeded 38 billion six, from memory, somewhere between 36 and 39 million feet in total, and in soft wood production has not exceeded 30.5 or six billion in that period of time. And I am of the firm conviction and I think most other students of the economy of the timber industry have a similar feeling, that we have established definitely that a peak of 30 billion feet is all the timber, all the lumber that is going to be produced by sawmills over the period until somewhere in the neighborhood of the year [434] 2000 when it is possible there will be more timber available for cutting from the sustained yield operation that started around the '40's.

Q. Let me ask you a few more specific questions, sir, and before I get into them, it is a fact you have been employed by us to make certain studies and supply certain information, is it not?

A. Yes, sir.

Q. Do you recall when that was, approximately?

A. Not the exact date, but sometime in March. I remember at the time the trial was set for March 28th.

Q. It was some few weeks prior to that?

A. Yes, sir.

(Testimony of Kenneth Smith.)

Q. Have you made any studies with respect to whether there will be available for production any timber that could or might be used and milled by the Nagel Lumber & Timber Company?

A. Yes, sir.

Q. Have you been present throughout the trial here? A. Yes, sir, I have.

Q. You heard the testimony of Mr. Kirkpatrick yesterday, the assistant regional Forest Supervisor?

A. Yes, sir.

Q. You heard that, did you, sir?

A. Yes, sir. [435]

Q. On the basis of that study and that testimony which you have referred to, you have an opinion as to whether there will be available for production by the Nagel Lumber & Timber Company, by the Duke City Lumber for any period of time at all, sir; I am not asking for the expression of that period, only if you have an opinion.

A. I do have an opinion.

Q. Did you also make a study—you told us the purpose of arriving at the opinion with regard to the availability of timber for the Nagel Lumber & Timber Company, was that study also correlated with a study for the Duke City Lumber Company?

A. Yes.

Q. Is your opinion in the aggregate as to the number of years, or do you have one with regard to any given year and carrying it on through for a period of time?

(Testimony of Kenneth Smith.)

A. You mean with respect to this particular property in Winslow?

Q. The timber to be manufactured by the Duke City mill.

A. If there isn't a change in the form of Government that will cause a change in the policies in the Forest Service, it should go on in perpetuity, with one exception, that if that entire—what is it called Chevalon working circle—should be destroyed by fire it would change the picture, but aside from that it should go on in perpetuity for the reason it is operated on a sustained yield and they are not selling [436] off more than they cut.

Q. You heard the testimony yesterday of Mr. Kirkpatrick that the allowable cut in the Chevalon working circle through the year 1968 is 21 million feet?

A. Yes, sir.

Q. Net log scale? And after that, according to the management plan, for a period of twenty years some 18,163,000 feet?

A. Yes, sir.

Q. On that basis, sir, do you have any opinion as to whether timber can now be said to be reasonably available for manufacture by the Duke City mill for any period of time in the future?

A. Yes, sir, there is.

Q. In your opinion, for how long as a minimum, let us say, do you think that such timber will be available?

A. I think it will be available until they either burn up the forest or have a socialist government.

(Testimony of Kenneth Smith.)

Q. You have seen this exhibit marked 9, have you not, sir, in fact I think you assisted in its preparation. You have seen that exhibit before, have you not? A. Yes, sir.

Q. Did you have any part in its preparation or advising thereto? A. Yes, sir. [437]

Q. You note there the column under which are a number of figures net log scale? A. Yes.

Q. And another net lumber recovery to its right? A. Yes, sir.

Q. Do you know from your study and experience, sir, what is the difference between net lumber recovery and net log scale as a general proposition?

A. Yes, sir.

Q. Will you tell us, please?

A. Net lumber scale is the footage on which you pay for timber that you purchase.

Q. You say net lumber scale?

A. No, net log scale. If I said net lumber scale I am sorry, I meant to cover net log scale first. Net log scale is the footage which you purchase and on the basis for which you pay for it at the purchase price, or the log scale on which you credit your own woods if you bring in your own timber from your own forest you charge the settlement of it on a net log scale. Net lumber recovery is the lumber at the end of your green chain, or wherever you take your tally of your lumber recovery produced from those logs.

(Testimony of Kenneth Smith.)

Q. In practice can there be an overrun or an underrun based on the net log scale?

A. Almost invariably is. [438]

Q. Do you know from any experience or studies that you have made if there is any average of either an underrun or overrun of net lumber recovery on a net log scale?

A. In California, Washington and Oregon territory, I know it quite well, the standard——

Mr. Moore: We object to the standard in California, Washington and Oregon. I do not think that is material here.

The Court: He may answer as a preliminary matter.

A. (Continuing): I qualified that because I have never operated in Arizona. But the standard practice in the lumber industry is the same everywhere, on the West Coast at least, because I have seen evidences of it here in making other studies of Arizona. The standard overrun is 15 to 20 per cent. The spread of overrun sometimes get below 10 per cent on occasion, usually runs from 10 to 25 per cent. There are always, might be under 10, sometimes over 25, but the standard is considered to be anything between 15 and 20 per cent. The mill operators expect to get 15 to 20 per cent, and they are unhappy with the mill operation if it falls below 15 per cent. 15 per cent being the standard, the usual custom to be conservative is to expect an overrun of 15 per cent.

(Testimony of Kenneth Smith.)

Q. Is that the per cent of overrun shown on this Exhibit 9? A. Right, sir.

Q. Have you in the course of your work for us here, sir, [439] made or had available for your examination an analysis the interrogatories propounded by the plaintiffs to the defendants?

A. Yes, sir.

Q. And the answers to the interrogatories as made by the defendants? A. Yes, sir.

Q. Did you in that connection have available for examination and analysis the lumber production by Duke City during the period ending December 31, 1959? A. Yes, sir.

Q. Did you in connection with that analysis make any computation to determine whether or not Duke City in its operation of this Winslow plant as reflected by the answers made to the interrogatories, whether it had any overrun or underrun for the period ending December 31, 1959?

A. There are three figures which might be used in determining overrun available in that set of figures. The overrun on their statement of stumpage costs was 14.6 per cent, as I remember, something over three million feet. 14.6 per cent if applied to the sawmill production, with consideration for inventories beginning and end, something between 14 per cent and 14.6 per cent, as I recall. The figure I definitely pinned was the figure of stumpage costs overrun of 14.6 per cent. [440]

(Testimony of Kenneth Smith.)

Q. You had it for only that period ending December 31, 1959?

A. Yes, a thirteen months period, as I recall.

Q. Now, in your opinion, sir, is it reasonable to project any overrun at all with regard to the operation in the future of the Duke City plant?

A. Most definitely, as long as logs are bought and sold as they are now. You should not only project one, but I think you could reasonably on the practices of the Forest Service as they have existed up to now, reasonably anticipate an overrun in excess of 15 per cent, and that is conservative to set it at 15 per cent.

Q. Do you think it conservative to set that figure for at least through the year '73?

A. Yes, sir.

Q. Do you know whether the Forest Service in making its management plan and in its sale of Forest Service timber anticipates and allows for any overrun?

A. The standard practice as far as I know in all the areas in the West. As a matter of fact, there is a lack of uniformity about it that sometimes causes discussion, but it is the plan and the intention of the Forest Service to provide for overrun.

Q. Mr. Smith, have you made any studies—you told us about the availability of timber—for the purpose of trying [441] to arrive at an opinion as to the market for lumber in the future, extending say into 1973 or middle '70's—

A. Yes, sir.

(Testimony of Kenneth Smith.)

Q. Do you have an opinion in that regard?

A. Yes, sir.

Q. Will you tell us what that is?

Mr. Moore: Just a moment, if your Honor please, I think when we are projecting opinions on the market thirteen years hence that we are in a field that is too speculative even for an expert and I object on that grounds.

The Court: The objection is overruled. He may answer.

Q. (By Mr. Romley): Can you answer the question, please, sir?

A. If I remember the question correctly it is a short answer, yes, I have made such a study. Did you want me to say what the opinion is?

Q. Yes, what is the opinion in that regard?

A. Pardon, I didn't understand the question that far. I have a habit of going ahead and answering.

Q. I am trying to find out, sir, what your opinion is. You tell us you have one with regard to the market extending through 1973 or middle '70's, let us say for lumber.

A. The projection I made here with respect to five year intervals up to 1975, but the opinion is there is definitely [442] every anticipation that there will be a market for lumber in excess of the ability of the industry to supply lumber. That there will be an increasing impingement upon this 30 billion foot level, which is not going to be exceeded,

(Testimony of Kenneth Smith.)

in my opinion, before 1975 and likely not until sometime nearer the year 2000, because of the increase in population which will lead to an increase in family formation and an increase in the number of new housing units required which will be constantly demanding more lumber and pressing upon the supply, so that I cannot see any possibility, there will be ups and downs and always is. Nobody can say what day we may have another recession or how severe it might be, but it will average out over that period of time so there will be a considerably greater demand for lumber by 1973 than there is today or was in 1952.

Q. Mr. Smith, in connection with the studies which you have made are any of them on the local or Arizona level?

A. I have made studies—everybody knows that Arizona is booming as much as almost any part of the country except California or Florida.

Q. I don't know whether we will agree with that exception, but go ahead.

A. I have made studies as to the position of Arizona in the lumber supply business and its prospect for market for Arizona timber, I have made that. [443]

Q. When did you make that study?

A. I particularly looked into the Arizona formation after my employment by your company, your firm.

Q. You made reference earlier to something you did for the Navajo Tribe. When was that, sir?

(Testimony of Kenneth Smith.)

A. In 1958.

Q. Tell us what your employment was in that regard, what you did and what conclusions you reached with regard to the availability of timber, the marketability of timber and the profits that might be realized therefrom?

A. That last one would call for detail that I wouldn't have in my mind. But I made the study at that time of the timber available in the country with which the product of the Navajo Tribe, if they built their mill, would be competing arrived at the same conclusion I have stated here. There will be more demand for lumber than there will be lumber available and call upon a continuing market to make their product from their plant without having to buy in, say, into the market. I came to the conclusion also at that time that with only four per cent of the private ownership in the State of Arizona, 96 per cent in the hands of the Government, the entire 96 per cent being carefully operated by the Government on the basis of sustained yield which allows a certain maximum amount of timber they will be allowed to sell in any given year, and the fact that Arizona over the recent years, I [444] think we made a five year study, I would be sure of that, had been selling of the allowable cut about 67 to 75 per cent—the figure now is 75 per cent of the allowable cut is being sold—meaning there could only be that increase of pos-

(Testimony of Kenneth Smith.)

sibly another twenty-five per cent in the present allowable cut, which means that is all the lumber that could be produced in Arizona in competition with the product of the Navajo Tribe mill, if they built it. We concluded, both from a competitive standpoint of the other production which would be competing with them from this area and from the opportunity to sell that would be available to them that it was a sound venture and on that basis we calculated, after arriving at all the costs of the proposed mill, made an economical analysis on the return which they might expect from their investment and operating profit they might make. I didn't know you might have any interest in this and don't have them with me on my mind.

Q. Let me ask you one question in that regard. By whom were you employed to make this study on behalf of the Navajo Tribe?

Mr. Moore: That is immaterial, if your Honor please.

Mr. Romley: Part of the qualifications, your Honor, and background of the witness.

The Court: I don't think it makes too much difference. I assume it is the Navajo Tribe. [445]

The Witness: That's right, sir, the Navajo Tribe of Indians. They employed me three times in connection with that same project.

Q. (By Mr. Romley): Do you have any opinion, sir, as to the profits if any that reasonably might be expected to be made from the operation

(Testimony of Kenneth Smith.)

of the Duke City mill through the year 1973 on the basis of the studies and what has been said here?

A. May I answer this way? There is going to be the opportunity to make certainly as much profit as they have been making from the opportunity provided to sell their lumber. I have the opinion that well managed it could and should make even more money in the coming years than it has made, while I do not expect this situation to create a wild rise in the price of lumber, it will have the effect as is always the effect of having more markets than you have product, of giving them the opportunity to sell on a higher level of price than would be the case if they had a tough competitive situation. And as the years go along and it becomes less and less difficult to sell, they should be able to improve their profit margin. But what can be done in the future is speculative enough just with the things that can happen in the economy. And I have the feeling, it is a very conservative opinion to say the Nagel people could definitely expect to make as much per thousand feet over this future [446] period as they have in the period that it was available for examination since they had counsel, '52 to '58, when I studied it. And I have a particular reason for that opinion, if you want it expressed.

The Court: At this time we will take the afternoon recess.

(Afternoon recess.) [447]

(Testimony of Kenneth Smith.)

After recess:

Q. (By Mr. Romley): Mr. Smith, in your work in the lumber industry, your connections with the lumber industry, have you had occasion to become familiar with the span of years over which equipment in a saw mill can be—in a timber mill or lumber mill can be used? A. Yes, sir.

Q. Do you have any opinion, sir, as to how long either in years or over how many million feet a saw mill in good working condition can be used?

A. I have never seen one wore out yet. I bought a mill in 1950 that had been operating since 1863 and it is still operating today in 1960, ten years later. That gives that mill a life of something over ninety years. I know two other mills partially—one—these are two of the finest mills in California, one was built in 1895 and the other was built in 1912 and they are making perfect lumber and operating at optimum operating conditions today.

Q. Do you know what is the life of a planing mill in good working condition?

A. Well, the oldest one that I have ever seen that had been in continuous operation was in Ohio where a planer there had been operating for sixty-three years and was still making the finest fluted columns being made in America. I don't remember specifically other planing mill equipment that had [448] been operating longer than that forty-eight years, but I—that equipment is in perfect condi-

(Testimony of Kenneth Smith.)

tion today and still running and will continue to run and make good lumber as long as it is maintained.

Q. In your opinion, sir, would a saw mill and planing mill in good working condition in 1958 have a reasonable expectation of life through the year 1973 at least? A. Definitely, sir.

Q. Now, with regard to—just taking some of the major items on this depreciation schedule in evidence, number 11, do you know or have an opinion, sir, as to whether—or as to the number of years a dry kiln in 1958 in good working condition can be expected to last and operate efficiently as a minimum?

A. We are operating kilns now that were built in 1912. They have been upgraded twice in that period of time, and I don't remember the years of the upgrading.

Q. Tell me what you mean by upgrading, sir?

A. Putting in better equipment in order to get better drying or faster drying. The kilns that were put in at that time would still be drying lumber, but not nearly so cheaply or economically as they do by having put in new equipment. But the kilns themselves are still operating and a kiln which is on a proper foundation and tight, so that you don't lose your steam, will operate just as long as the building stands [449] if you keep your equipment up.

(Testimony of Kenneth Smith.)

Q. From time to time I assume you need some repairing to that equipment, do you not?

A. That's what I meant when I said maintenance, a piece of machinery will wear out much faster if it is not well and properly maintained, and if it is well maintained it will last indefinitely.

Q. Does the cost of maintenance go into depreciation or operation expense?

A. Cost of maintenance goes into operating expense.

Mr. Moore: Wait just a moment, please. We object to that on the ground that I don't believe the gentleman is yet qualified as an expert in accounting.

The Court: The answer may stand.

Q. (By Mr. Romley): Have you had any experience, sir, upon which to base an opinion as to the life of carriers and lift trucks, trucks, trailers, auto patrols and board pickup? That is assume them to be new, now in the used condition they were in 1948 but assume new equipment of that type.

A. Usually five to fifteen years and usually depreciated out in five to eight years.

Mr. Romley: You may cross examine. [450]

Cross Examination

Q. (By Mr. Moore): Mr. Smith, you have told us so much I really don't know where to start.

Have you ever been in the operating end of the lumber business?

(Testimony of Kenneth Smith.)

A. I started in the operating end in the planer.

Q. How long did you stay with it?

A. And for the ten years I was with Pacific I was the liaison between the president of the company and the operating department in Scotia, I never ran a saw mill.

Q. You never ran one?

A. I never ran a saw mill.

Q. You have never been in the lumber business yourself individually other than as an employee for someone? A. Right, sir.

Q. You were with Long-Bell first when?

A. Yes, a total of fourteen years. First from 1912 to 1919 and again from 1921 to 1926.

Q. That was before it went into receivership in the thirties? A. Right.

Q. I understood you, I believe, to say that future profits and future markets were speculative, but yet conservative.

A. You mean the market for the United States or what I said [451] about the Nagel prospects?

Q. What you said about the Nagel, speculative in the future but still this was a conservative estimate.

A. I consider it quite conservative.

Q. What is speculative about it?

A. Speculative about the annual or day to day and month to month return, because the lumber is sold like wheat on the market and one car pushed

(Testimony of Kenneth Smith.)

out on the market in excess of the then current demands on that day will weaken the price, one car short of the demand on that particular day will up the price.

Q. Do you know that as a matter of fact California lumber has the lumber market depressed in Phoenix today?

A. I am not that familiar with it or that close to it.

Q. Have you heard that from any source?

A. No, sir.

Q. There is also more speculative features in the lumber business than just the market, isn't there?

A. There used to be an extremely speculative feature in the timber supply, in the price of logs. But that has become pretty thoroughly stabilized in recent years and is much more stable and tight than lumber prices.

Q. Is forest fires a hazard?

A. Always has been in the lumber business.

Q. Insects? Diseases in the forest a [452] hazard?

A. Disease and fire have traditionally, up until the last few years when better controls have come in, consumed more wood per year than was consumed in making lumber.

Q. Well, we haven't yet progressed to the point that we have forest—the forest fire hazard completely under control, have we?

A. Right, sir. But there has been a tremendous improvement made over the last fifteen years.

(Testimony of Kenneth Smith.)

Q. Has there been any improvement since 1860 in the manufacture of saw mills?

A. A great many improvements, yes.

Q. But this one you mentioned I believe you said was built in 1860 and in 1960 it isn't worn out and is still producing excellent lumber?

A. Yes, sir.

Q. And you know of two other mills, one in 1895 and one in 1912 that are still producing excellent lumber?

A. Yes, sir.

Q. And the planing mill, 63 years and 48 years on the two you mentioned?

A. Yes, sir.

Q. Does a dry kiln ever become obsolete?

A. Yes, sir, it becomes obsolete in the sense—not in the sense that it wouldn't dry lumber as good as it did before, but in the sense that it's not economical to dry lumber in it [453] because you can put in so much better equipment than the original equipment today. Dry kilning has had a tremendous improvement as compared with saw milling.

Q. Well, it will become obsolete in the manner in which it will dry the lumber, won't it?

A. Not if it is maintained, if it's kept tight and the equipment is maintained and the fans are maintained it will dry lumber at the same rate twenty years from the day it starts as it will the first day.

Q. Have you ever operated a dry kiln?

A. No, but I have studied the costs on them for lots of years.

Q. Carriers and lift trucks you say wouldn't wear out for fifteen years, some of them?

(Testimony of Kenneth Smith.)

A. Quite frequently able to run carriers, particularly in retail yards for that period of time.

In other heavy duty they will wear out faster.

Q. I didn't understand.

A. I say under heavy duty they will wear out faster than they will if they are not under heavy duty.

Q. You were projecting profits into the future, and you have inspected, I assume, the Nagel mill in Winslow? A. No, sir.

Q. You have never seen it?

A. No, sir. [454]

Q. Have you ever seen the Duke City Lumber Company mill in Winslow? A. No, sir.

Q. Have you ever seen any of the equipment used there?

A. No, sir. Oh, I wouldn't say I hadn't seen the equipment, because I don't know what's in those mills.

Q. If it has a capacity of 30,000,000 feet per year on two shifts, could it be operated economically and at the same profit per unit on 10,000,000 feet?

A. Could if they cut their fixed overhead to match. My assumption would be that it wouldn't be as profitable unless they made the necessary managerial changes and increase in efficiency to make it so.

(Testimony of Kenneth Smith.)

Q. What changes in management would you make when the production is reduced from thirty million to ten?

A. Cut all of the unessential overhead.

Q. Well, that's a general term. What overhead do you cut?

A. For one thing, you have got extra superintendents that are required if you are operating, there is an economy in operating two shifts, that's the reason it's done. But you do have some additional personnel required by reason of operating on one shift. You have to have a higher grade of more expensive sales manager if you are operating two shifts with twice as much lumber to get rid of. [455]

Q. And also to produce ten million feet a day you have still got the same physical plant that you had to produce thirty million, haven't you?

A. Yes.

Mr. Romley: You mean a year, you said a day.

Mr. Moore: I meant a year.

Q. (By Mr. Moore): Excuse me, I didn't mean to mislead you.

A. You have the same fixed overhead such as insurance and depreciation.

Q. Have you ever had any experience in the cutting or the manufacture of Ponderosa pine other than this Navajo Indian job you told us about?

A. Except years ago in the case of the Weed Lumber Company in Weed, California, which was a subsidiary of the Long-Bell Lumber Company.

(Testimony of Kenneth Smith.)

Q. Has most of your experience been with redwood in California?

A. No, it started with Southern pine and the hardwoods of the South, then my next experience was with pine in California and then redwood, and Douglas fir in the Northwestern California.

Q. Does the Navajo Tribe in connection with the setting up and operation of a mill and the manufacture of lumber from timber on the reservations face the same problems that an [456] independent operator does in Winslow, for example?

A. With one exception.

Q. What's that? A. Taxes.

Q. Do they have to pay any stumpage cost?

A. Yes, sir.

Q. To whom?

A. The Indian Service of the Federal Government.

Q. That's not owned by the Tribe?

A. It's under the control of the Federal Government.

Q. I know it's under——

A. It's owned by the Tribe, I mean on paper.

Q. But it's under the control of the Federal Government?

A. That's right, and they sell the stumpage to the manufacturing department.

Q. They don't have tax problems?

A. As I understand it they are not required to—will not be required to pay taxes.

(Testimony of Kenneth Smith.)

Q. And that tax problem is quite substantial in any business, isn't it?

A. All the ones that I have been connected with, it is.

Q. Now, with respect to the overrun which you were talking about, Mr. Smith, are the standards of overrun the same on large logs as they are on small ones?

A. No, sir, you get more overrun on small [457] logs.

Q. You what?

A. You get more overrun on small logs.

Q. More overrun on the small logs. What do you classify as a small log?

A. Well, depends on what woods you are talking about, and I am not qualified to give you the details of where the breakdown is.

Now, that a long log with more taper has more gain in the footage than a large log with small taper, but I can't tell you anything about the breakdown or where it comes.

Q. Well, you are using the term, Mr. Smith. In your opinion what do you mean by a small log or a large one?

A. Well, small log is the kind of log that they are cutting down in east Texas now which I have seen operate on a 41-foot per log, a large log is the type that is cut in the redwood area which runs on an average of about 960 to 1,000 feet per log, and they are all saw logs.

(Testimony of Kenneth Smith.)

Q. Do you know whether the Forest Service guarantees an overrun?

A. The Forest Service could not be said to guarantee an overrun. They fix the price that they charge for stumpage on the basis of anticipating that you will get an overrun.

Q. Have they changed their policy in the last few months with respect to that?

A. They are—I can't say definitely whether they have [458] or have not. They have had under way all over the West a survey to attempt to stabilize or get in the approximate stabilization the policies of all the six western districts on the allowance for anticipated overrun, and the factor of profits which they undertake to guarantee just as in the same manner that they undertake to guarantee overrun, only that it's used in making the calculation at which they will establish the price that they are going to charge for stumpage.

And they are attempting to get all of those things down in the same way in all of the districts for the reason that there has been a considerable variance of policy between their several offices.

Q. Does the Forest Service guarantee a profit to the operator who buys timber?

A. They guarantee a profit only if you are competent to make it. They figure in establishing the price, and they are required to by their own manual for establishing of the price for stumpage, to include a factor for profits and risk. And that has

(Testimony of Kenneth Smith.)

averaged out in the California area, where I have the figures, to be about 10 percent over the past seven—I think it's seven years.

Q. Let me ask you again: Does the Forest Service guarantee a profit to the operator.

A. They do not.

Mr. Romley: That has been asked and answered, [459] your Honor.

A. They do not, they undertake to give you the opportunity to make a certain amount of profit and risk, you have to be competent enough to do it after you get the timber.

Q. (By Mr. Moore): What if the market drops?

A. The market always drops sooner or later as it always goes up. I mentioned a while ago it's a market commodity sold on the open market every day and it goes up today and down tomorrow.

Q. Well, suppose you have got a certain fixed price of stumpage under Forest Service cutting contract and the market drops seriously?

A. Then you will make less money than you anticipated making when you made the contract.

Q. It can drop to the point where you wouldn't make any money, can it?

A. Conceivably, not at all likely to.

Q. And when it does there is no guarantee by the Forest Service of any profit there?

A. None whatever. They follow the practice traditionally and well known of trying to make it up to the contractor the next time, but they have no obligation to do so.

(Testimony of Kenneth Smith.)

Q. Now, let me go back to this overrun a minute.

Is that the result of the method of log scaling? Is that where that overrun comes in? [460]

A. Primarily, it's custom. It's a matter of the price if you didn't have the overrun you'd pay less per thousand feet for the consumption if it was scaled on lumber production.

Q. What system of scaling does the Forest Service use in the Sitgreaves National Forest?

A. I do not know.

Q. You have no idea? A. I do not know.

Q. Is there a defect factor determined in or involved in determining the net scale?

A. That's the way the Forest Service does it, they scale full round logs and then determine from sample plots what the defect is and deduct that from that the entire year's cut or month's cut or however often they sample the defect.

Q. When do they do that scaling, on the tree or after it's cut into the log?

A. Initially they scale before they offer the timber for sale on the basis of the standing tree. The sale is made on the basis of the scale after the tree is cut down.

Q. Do you know whether they are making any change in their system with respect to the Sitgreaves National Forest now?

A. I do not know.

(Testimony of Kenneth Smith.)

Q. Now in talking about this future, bright market and conditions for the lumber industry, is there any assurance that either the Nagel Lumber & Timber Company or Duke City [461] Lumber Company will be the successful bidder on any sale in the Sitgreaves—in the Chevalon working circle?

A. Nothing in the future is certain, but I would say that they have a far better certainty, a far more certain future being able to buy that timber than exists in any other western area that I know about for the simple reason that they now already have committed all of the cuts that's possible in that forest.

Q. They have what?

A. They have already committed all of the cuts that's likely to come out of that forest. There may be some—

Q. You mean the Forest Service has?

A. The Forest Service has. There may be some increase but they are committed now for some twenty-five years ahead and they can increase that if they wish to—if they find that it's possible to sustain a larger allowable cut.

Q. Now, you used the term several times in your direct testimony, "Sustained yield." What does sustained yield mean?

A. Sustained yield means taking an available timber property and cutting off of it each year the growth that occurs in that forest each year, the equivalent of the growth in footage.

(Testimony of Kenneth Smith.)

Q. Is there any difference between that and the sustained yield agreement with the Forest Service?

A. The sustained yield agreement with the Forest Service [462] is merely an agreement that it will be operated in such a manner as to insure that the annual cut will not exceed the annual growth.

Q. Well, isn't it a fact that under a sustained yield agreement such as exists at Flagstaff, Arizona, that the operator there is guaranteed so much timber without competitive bidding?

A. If you have—I don't know, there is only very few in existence.

Q. That's right, there is one in Flagstaff?

A. But where they have that type of contract no one else bids on it, it's on a contract.

Q. That's right. And where you have been using the term "Sustained yield" you did not mean that kind of a contract that we just mentioned at Flagstaff?

A. I don't know that particular contract, but all of the contracts that I have seen of that type with the Forest Service require the properties to be managed on a sustained yield basis of it, in other words not to cut in any year more than the growth on the forest.

Q. Well, what you mean by sustained yield is that it is set up so that it will be approximately a certain number of feet of timber available each year?

(Testimony of Kenneth Smith.)

A. Right, the growth of the forest will be available for cutting. [463]

Q. And that has nothing whatever to do with the abolishment of competitive bidding at those sales?

A. I can't see any connection between sustained yield and competitive bidding.

Q. Well, I want to distinguish between the term sustained yield that you have used and the term I used which I think is proper, I may be wrong, the sustained yield agreement with reference to the Flagstaff mill. A. If—

Q. Southwest Lumber Company.

A. If that is the same as the agreement in the Olympic Forest up north, all that it does between what the Forest Service does itself is that it eliminates competitive bidding year to year.

Q. Yes. Well, this sustained yield thing actually that you are talking about actually depends upon the management plan that's adopted, doesn't it?

A. By the Forest Service for the area.

Q. And it's subject to—that particular one Chevalon working circle is subject to revision each five years? A. That's what I—

Q. Subject to review each five years?

A. That's what I understand, subject to review each five years and revision each ten years if I understand correctly. [464]

Q. And I assume if at the end of five years there had been a forest fire and a lot of it destroyed and

(Testimony of Kenneth Smith.)

it was reviewed and a revision was justified it would be made then instead of at the ten year period, wouldn't it?

A. They have the authority to do it in that circumstance.

Q. What log scale method is used in Oregon and Washington and California?

A. By the Forest Service the same as they use all over the West, as I understand it.

Q. Well, I thought I understood you that you didn't know what they used in the Sitgreaves National Forest in Arizona?

A. I don't unless they are using what I am accustomed to, I mean I have no specific knowledge about the Sitgreaves National Forest.

Q. All right. What I'm asking you is what log scale method is used in Washington, Oregon and California?

A. They use there the growth scale and scale back for defect.

Q. And the scale what?

A. Scale back for defect.

Q. Scale back for defects?

A. Yes, and defects are usually established by a trial plot.

Q. Have you given consideration—I'm sure that you have [465] seen on television Kaiser's aluminum advertising?

A. I have, sir.

Q. You have seen Kaiser Steel advertising?

A. Yes, sir.

(Testimony of Kenneth Smith.)

Q. And you have heard of the developments that are being made in gypsum products for building?

A. Oh, yes, I am thoroughly familiar with it.

Q. Have you given any consideration to the effect that the development of new products may have on the building industry and the resultant effect upon the lumber industry?

A. Yes, sir.

Q. Has that, too, affected any?

A. You do that and we have always discounted that over a period of years. We used to anticipate getting from twenty to twenty-two thousand feet of lumber per house built in the United States, and we have today scaled that down to under fifteen thousand feet and recognizing that some houses will and can be built with practically no lumber in them, and that there will probably be an increase in the type of that and there will probably have to be an increase in the number of houses so built in order to build enough houses to house the people that are going to be living in the United States, because there will not be enough lumber to build all of them out of wood.

Q. We'd better all get into the lumber business, hadn't we? [466]

A. It's a very excellent business if you have timber and a source, a dependable source of timber it is an excellent business to be in.

Q. No risks?

A. I would say no more risks than are inherent in any other operating business.

(Testimony of Kenneth Smith.)

And in the case of an operator whose supply of timber is the Federal Forest Service, less risk than the great many other businesses have.

Q. Well, you have heard of Whiting Brothers and Kaibab Lumber Company in northern Arizona?

A. I have heard the name, I don't happen to know any of them.

Q. Do you understand that's one of the larger operators and one of the good operators in Arizona?

A. I have heard the name in the sense of being regarded as good operators, that's all I know.

Q. Do you know they have bought a mill recently at Payson, Arizona? A. I do not.

Q. Do you know that they are short of timber now and are out looking for additional timber?

A. Didn't they know that when they bought the mill?

Q. They knew Sitgreaves Forest was just up on the hill [467] from Payson, I'm sure, and there isn't anything in the world to keep Kaibab Lumber Company from bidding on each and every sale in the Sitgreaves Forest, is there?

A. Yes, sir.

Q. What is it?

A. The amendment to the Little Business Act in 1958 which requires the Forest Service to give small businesses preference who already have an established position, even to giving them preference in price against an outside bidder.

(Testimony of Kenneth Smith.)

Q. Well, let's assume that Nagel and Duke City and Kaibab Lumber Company are all about the same size, relatively speaking. Now, would there be anything that would prevent Kaibab from walking into any sale and bidding on it?

A. I think not.

Q. Assuming they can qualify financially?

A. I think not if they would meet all the qualifications.

Mr. Moore: That's all, thank you.

Redirect Examination

Q. (By Mr. Romley): You said a moment ago, sir, that there is no more risk in the lumber industry and I think you are referring to Duke City here, than are inherent in any other operating business. On what do you base that opinion, sir?

A. Well, just on general experience but, for instance, [468] I'd much rather have the saw mill than a motel.

Q. Did you have some statistics which you used for comparative purposes?

A. Not immediately available, not with me. But failure statistics indicate that small manufacturing business, small retail business and motels have the highest rate of fatality. The Dun and Bradstreet monthly compilation indicates that.

Q. I don't think my good friend Mr. Moore meant to imply that you were responsible for the Long-Bell receivership. Were you?

(Testimony of Kenneth Smith.)

A. I wondered when he asked that, but I wasn't high enough up to assume any responsibility for that at that time.

Mr. Romley: If the Court pleases, there is one matter that I neglected to cover on direct that I would like leave to go into, it's a very brief one.

The Court: Very well.

Q. (By Mr. Romley): Mr. Smith, do you have any opinion, sir, as to what would be a proper item dollar wise, or proper amount, I should say, for management expense of—by that I mean manager, assistant if one is necessary in the operation of a mill of the size and capacity of the Duke City mill about which you have heard the testimony?

Mr. Moore: I object to that, your Honor. I think the witness has said he has never seen the mill, he has never been up there, he doesn't know anything about it, it's a unit [469] of a larger group. I think that's highly speculative.

The Court: I don't think you have enough foundation.

Q. (By Mr. Romley): Mr. Smith, do you know upon what factors the salary paid a manager or an assistant manager are based?

A. Primarily on the size of the business. There is always a range from low to high, and if you have enough of them you can establish a median. And there is always the difference between the manager who is thought to be, by his employers, more competent in the place and making more money for them than a lesser competent man. But

(Testimony of Kenneth Smith.)

there is a rough yardstick used with the provision that a very small business will pay frequently a little over the yardstick and a large business will usually pay considerably under, and that's one dollar a million.

Mr. Romley: That's all.

Recross Examination

Q. (By Mr. Moore): What was that figure?

A. One dollar a million feet.

Q. One dollar per what?

A. One dollar per million per year for salaries for the top management. That's a rough yardstick used in setting up the prospectus for a new enterprise. That's what we did [470] use in setting up the prospectus for the Navajo Tribe.

Mr. Moore: That's all.

Redirect Examination

Q. (By Mr. Romley): Is it one dollar or one thousand dollars per million? Translate that to us into twenty-two million.

A. Twenty-two million would be \$22,000 a year for salary.

Mr. Romley: Okay, sir, thank you. That's all.

Recross Examination

Q. (By Mr. Moore): Now that salary applies to the manager?

A. General manager. Usually you only have one top man in a small business.

(Testimony of Kenneth Smith.)

Mr. Moore: Thank you.

The Witness: You would have a general manager, superintendent of the plant and a superintendent of the woods.

Redirect Examination

Q. (By Mr. Romley): Do you know where the superintendent of the plant and the superintendent of the woods, where his salaries are charged?

A. The plant man's salary would be charged to production, [471] plant production, saw mill production, lumber production, however you term it.

And the salary for the forest superintendent would be charged to logs.

Q. The part of management expense or operation expense?

A. Operation expense.

Q. Operation?

A. Except the general manager.

Mr. Romley: That's all.

Mr. Moore: No further questions.

Mr. Romley: May this witness be excused, your Honor?

The Court: You may be excused, Mr. Smith.

DALE O. NELSON

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Would you state your name, please, sir? A. Dale O. Nelson.

Q. Where do you live, sir?

A. Winslow, Arizona.

Q. What is your business or profession?

A. I am comptroller for the Nagel Lumber & Timber Company. [472]

Q. Are you also a certified public accountant?

A. I am.

Q. Registered and qualified to practice in this State?

A. In this State and in Washington.

Q. You mean in the State of Washington or Washington, D. C.?

A. State of Washington.

Q. How long have you been the comptroller with the Nagel Lumber & Timber Company?

A. Since the Spring of 1956.

Q. And in the same capacity since that time?

A. That's right.

Q. Mr. Nelson, are you familiar with the manner and steps in which logs are scaled that are milled at the Nagel Lumber & Timber Company mill in Winslow? A. I am.

(Testimony of Dale O. Nelson.)

Q. Can you outline for us briefly, please, just what those various steps are? Start with the timber upright in the woods.

A. We have—we are billed by the Forest Service on the basis of the net log scale as determined by their cruise of the plots which have been designated for cut. This, as I understand, is a cruise of the standing timber. The next scale that is made by our employees is a gross log scale of timber felled and buck trees skidded to a loading landing in the woods. [473] This is used as the basis for paying our logging contractors.

Q. Is there a term commonly designated to that step?

A. Well, this would be the skidded log deck.

Q. Is that the first scaling on the part of the operator?

A. That is correct.

Q. And that's a gross log scale?

A. Gross log scale.

Q. The first one ahead of that was the Forest Service, the net log scale?

A. Which is net log scale, yes, sir.

Q. Now, what is the second step of the operator in the scaling process?

A. The logs are then loaded on log trucks and trailers and are hauled from the woods to our pond or deck area at the mill. Before the logs are unloaded one of our employees scales the individual logs on that loaded truck in order to determine the amount of gross log scale that has been hauled from the woods into the mill. [474]

(Testimony of Dale O. Nelson.)

Q. What if any term is delegated to that, or designated?

A. This would be our mill deck.

Q. Is that the second step?

A. This is the second step in the operation.

Q. That is the mill deck? A. Yes, sir.

Q. Where is the truck haul, is that a separate term with regard to scaling?

A. For the purposes of our statements, we use the accumulated figures on a monthly basis as we do prepare monthly statements of the total truck scales, which are made at our decking area at the mill.

Q. Give me again the name of this second step. You say the mill deck scale?

A. No, this is not mill deck.

Q. With reference to skid log deck, that is the number one step, what is the second one?

A. Log deck, mill log deck.

Q. And that scaling is done while the logs are being, before they are dumped they are in the carrier from the forest to the mill, is that right?

A. That is correct.

Q. Then is there a third step?

A. I might enlarge on that second step before we pass on to that. That figure is denoted on our statement as truck haul. [475]

Q. Your figure, you mean in this seven series of exhibits is truck haul?

(Testimony of Dale O. Nelson.)

A. That is correct.

Q. Mill log deck and truck haul, so far as the statements are concerned are synonymous?

A. That is correct.

Q. Is there a third step?

A. The logs are dumped by the use of frames into the pond, floated across the pond into a well adjacent to the mill where they are floated over lifting chains and they are then hoisted from the water up to the mill deck, the sawmill deck. As they clear the water they are stopped and a man there scales them the third time, again a gross log scale.

Q. What do you call this scale, or is there a name?

A. This is referred to in our terminology as the mill deck scale.

Q. Do I understand from your testimony, sir, that each of these three steps of scaling by the operator is a gross log scale?

A. That is correct.

Q. And each of these are all prior to the log reaching the saw at the mill, is that right?

A. That is right.

Q. Are there any others between the mill deck scale and actual sawing of the timber, any other scales? [476]

A. No, there are no other scales.

Q. Is there scaling after the logs are sawed?

(Testimony of Dale O. Nelson.)

A. We have recently incorporated a green chain tally but this was not in effect until this spring's cut was started. Prior to that time we determined our lumber production by our sales figures of finished lumber or lumber sold, adjusted by the inventories of lumber on hand.

Q. And is that figure, this last one you have mentioned, the one designated on Exhibit 9 as the net lumber recovery?

A. That would be the net lumber recovery.

Q. Now, is the mill deck scale, the third one you mentioned, when it is dumped in the pond and lifted to the mill deck and scaled, the final process before the logs are actually run through the saw, is that the item shown in this series 7 in any way?

A. It is shown on logs sawn.

Q. Logs sawn. Is there any relationship between the logs sawn as shown in this 7 series and the Forest Service net log scale?

A. Not directly.

Q. Do you know from your experience with the Nagel Lumber and Timber Company if the Forest Service net log scale is the same or differs in any way from the logs sawn as reflected in this series 7 Exhibit?

A. It differs materially. [477]

Q. You say what?

A. It differs materially.

Q. In what way?

(Testimony of Dale O. Nelson.)

A. The logs sawn figure is stated on a gross log scale before deducting defect factors. The net log scale or basis upon which we purchase the timber from the Forest Service is stated in a net log scale which is the estimated scale of the tree after deducting accumulated defects factor.

Q. That net log scale is done by the Forest Service in the forest?

A. Yes, the net log scale would be substantially smaller than the gross log scale or log sawn figure.

Q. This Exhibit 7 series show the—or you told us it shows the logs sawn. Does it show the net log scale?

A. At no place.

Q. Are there any records of the Nagel Lumber & Timber Company which show the net log scale and their relationship to the logs sawn as reflected in this series 7 Exhibit?

A. I have prepared studies of our lumber realization showing the net scale which we have purchased during successive logging seasons, starting with March, 1957, through March of 1960, comparing the lumber realization or net lumber scale, as you state, with the net log scale we have purchased.

Q. And——

A. These of course are based on the summaries of the [478] reports of timber cut which are furnished to us on a monthly basis by the Forest Service and from the settlements which we have made with the Southwest Lumber Company.

(Testimony of Dale O. Nelson.)

Mr. Moore: I don't want to interrupt too much, but I must object. I think those records are the best evidence.

Mr. Romley: I haven't asked him what the records reflect. He is identifying them, then I am going to show what they are.

The Court: He has testified he made the studies and how he prepared them by the contents of them.

Mr. Romley: I hadn't inquired as to their contents yet, your Honor.

Q. (By Mr. Romley): Studies that you made, do they reflect the relationship between the net lumber recovery as against the net log scale made by the Forest Service?

A. They do by each year and accumulated to date.

Q. You say you made such studies starting in March, 1957 and brought them through March, 1960?

A. That is correct.

Q. Are the studies which you prepared and that you have here with you—perhaps I am getting the cart before the horse—do you have any of those studies here, sir?

A. I do.

Q. Are those you have by calendar year or otherwise?

A. No, they are by logging season. [479]

Q. And what is the logging season?

A. Our normal logging season runs from March to March.

Q. I would assume then you mean March 31st through the following March 31st?

(Testimony of Dale O. Nelson.)

A. In some cases due to weather conditions the period would cover thirteen months period and in other cases, cover a twelve months period.

Q. Then the studies you have made and brought with you are on a basis ending in late March of the years '58, '59 and '60, is that right?

A. That is correct.

Q. And you have no such figures here on a calendar basis we could use for comparison with the 7 series Exhibit? A. No, I don't.

Q. Are there such records available?

A. They could be prepared. They are not available, they have not been prepared on that basis.

Q. Where are those records, sir?

A. Well, the details would have to be derived from the books and records in the Winslow office of the Nagel Lumber Company.

Q. They are all there? A. Yes.

Q. And all the information can be obtained from those records? [480]

A. That is right.

Q. Do you know from your experience as the comptroller for this company whether there has been any overrun on the net log scale during any of the times prior to this date? A. I do.

Mr. Moore: I think the record is the best evidence, if your Honor please.

The Court: I take it he knows it only from his records.

Mr. Romley: That is right.

(Testimony of Dale O. Nelson.)

The Court: He wouldn't personally do the scaling and checking and the records therefore would be the best evidence.

Q. (By Mr. Romley): Take any one of these seven series, sir, Mr. Moore inquired of Mr. Brunell about this morning. Here is one for the year 1956. Let's see if I made any notes on that, or take any one here, it makes no difference. I have some notes on 1958, let's take that one, sir. That is Exhibit 7-H.

Mr. Moore: Which year is that, Mr. Romley?

Mr. Romley: 1958.

Q. (By Mr. Romley): My notes indicate that on page 7—would your Honor like to follow that? I have another copy.

You have page 7 there, do you, Mr. Nelson?

A. I do.

Q. I believe my notes are correct with regard to Mr. Moore's [481] question. Do you find there a figure of logs sawn?

A. I do, 21,877,500 feet.

Q. Do you find there—now, insofar as logs sawn, does that reflect the net log scale for that year or does it reflect the gross log scale?

A. The gross log scale.

Q. I believe it is your testimony that the net log scale is less than that figure, but the amount we don't know, is that right, sir?

A. That is correct.

(Testimony of Dale O. Nelson.)

Q. Now, do you show, or does there appear, I should say, on this same exhibit an item of overrun? A. There does.

Q. Is that shown there as 122,370?

A. That is correct.

Q. Is that the overrun on the net log scale or is that the overrun on the gross log scale as reflected by the logs sawn?

A. On the gross log scale.

Q. Then the percentage Mr. Moore spoke of this morning in his examination of Mr. Brunell was the ratio of the 122,370 to the gross logs sawn rather than to the net log scale, is that right?

A. That is right.

Q. Based on your experience as the comptroller—again [482] I am afraid I am getting into the records. I will stop there.

We have been speaking now of only one exhibit, I believe it is 7-H for the year 1958, is that correct, sir, those on the front page there?

A. Yes, 7-H, 1958.

Q. Is the same true insofar as the method of computation and reference to logs sawn, et cetera, percentages, without going into all of them, is the same true of the entire seven series?

A. The entire series does not show as much detail as this particular report, but the same scaling methods have been used and the same ratios would apply as would apply here to 1958.

(Testimony of Dale O. Nelson.)

Q. Do you have any opinion, and please tell us yes or no without expressing the opinion, if you have one, as to the overrun, if there has been any, of the Nagel Lumber & Timber Company over the net log scale? A. Yes.

Q. On what do you base that opinion, sir?

A. On the lumber realization studies to which I previously referred, covering the period March, '57 through March, '60.

Q. Did you have any part in the preparation of in the assisting in the preparation of Exhibit 9 which is entitled: Available Timber at date of sale?

A. I did. [483]

Q. Are you familiar with the statement that appears thereon showing net recovery as based on an overrun of 15 per cent on the net log scale?

A. I am.

Q. In your opinion does the overrun, or I should say, has the overrun at Nagel Lumber & Timber plant at least equalled during the last three years the 15 per cent on which this particular exhibit is based?

Mr. Moore: We object to that, if your Honor please. It is the same thing that was excluded a moment ago. His opinion is based upon reports and records which are available and they are the best evidence.

The Court: The records would be the best evidence.

(Testimony of Dale O. Nelson.)

Mr. Romley: Your Honor, the developing this morning on cross examination of Mr. Brunell, which to my mind has confused the issue rather than aided it, will be unable to present those records or make that analysis, if it is deemed important, until we resume next Tuesday. But I have already spoken to Mr. Nelson and he will be working on it this week-end and on **Monday I will have** those records here available so counsel can examine them to his heart's content. So if I may, I would like to defer any further examination of the witness. It was one of those things we hadn't anticipated. They are going to base a percentage on gross log scale when we take a net log scale. We will have to bring those records [484] in and substantiate our position in that regard. May I reserve the right to recall this witness, your Honor, after he has produced those records?

The Court: Very well. Of course he has explained the figures in Exhibit 7. As I understand it now, you are thinking of going further and getting records, further records from Winslow.

Mr. Romley: Only to corroborate what he has said, that is all. The explanation has been made and I think if counsel wants the opportunity to examine the records we will afford him those records.

The Court: Very well.

Mr. Romley: If he tells me he doesn't want them, I won't bring **them**.

(Testimony of Dale O. Nelson.)

Mr. Moore: May I inquire, if the Court please, of counsel whether or not they have furnished the United States Forest Service reports on overruns during the period he is talking about?

Mr. Romley: I have no objection to your asking the witness, I cannot tell you myself.

The Witness: I don't believe there is anything that requires us to furnish these reports to the Forest Service.

Mr. Moore: As far as you know, Mr. Nelson, you have not prepared or furnished to the Forest Service any report with respect to overrun, given year or given period of time? [485]

The Witness: Not to my recollection.

Mr. Romley: I have no further questions of the witness at this time, Mr. Moore. You may cross examine now if you wish.

Mr. Moore: He has talked about an analysis.

Mr. Romley: I have an analysis here, it is not on a calendar year basis. I was afraid it would be more confusing than helpful. I will produce it now.

Mr. Moore: I would like to reserve the cross examination, your Honor, until in the morning until we have a chance to look at these. Mr. Romley pointed out that the examination this morning was something he didn't anticipate.

The Court: Why don't you go ahead with the cross examination. It will be recess time before you get to that.

Mr. Moore: I don't know that I have any other than that actually. Give me just a moment.

(Testimony of Dale O. Nelson.)

Cross Examination

Q. (By Mr. Moore): Mr. Nelson, does the term underrun or overrun have a definite meaning in the industry?

A. Only in relation to two separately stated figures. We in all of our discussions have been using an overrun based on net log scale. The overrun as stated in the auditor's statements is overrun based on gross log scale. [486]

Q. You say it has a definite meaning with respect to those figures. What is the definite meaning of it?

A. You are speaking of overrun?

Q. Yes.

A. It is excess of lumber production to a log scale.

Q. Which log scale?

A. That was what I was trying to point out. Normally it is net log scale.

Q. That is the normal understanding of it? And do you know why it is in your reports under the title overrun, underrun or overrun and the figures set there?

A. It is a matter of tracing costs through the various departments based on the volumes processed by each individual department. Our sawmill costs are originally stated on the basis of the logs going into the mill and this scale is based on a gross log figure. It is used merely for supplemental control purposes. Now, we have to entitle the dif-

(Testimony of Dale O. Nelson.)

ference between this log scale and our ultimate lumber production and it is entitled overrun or underrun in our statements.

Q. Is there some reason for using underrun and overrun to designate what you say it designates in these reports rather than the normal meaning and usage of the term in the lumber industry?

Mr. Romley: I object to the form of the question. It is not what he says in these reports. [487]

Q. (By Mr. Moore): What is said in these reports then? Do you understand what I am trying to get at?

A. I am afraid I don't follow you.

Q. Is there some reason why the term underrun or overrun was used to designate what you have now told us it does designate in these reports, Exhibit 7-A to 7-I?

A. Only as I have previously answer the question.

Q. I missed it if you did.

A. The logs sawn is a fixed figure. It is based on a gross scale of logs going into the mill. When we compute, based on our sales and inventory figures, the lumber production produced by these gross logs there has to be an adjusting figure and it is merely this adjusting figure is stated as overrun or underrun in our reports.

Q. And you use it in your reports in that meaning or to show the difference between the gross log scale and the net lumber production?

A. That is correct.

(Testimony of Dale O. Nelson.)

Q. Rather than the net log scale and the lumber production? A. That is correct.

Q. Any reason why you do that, other than what you have said?

A. No. It seems to be a valid reason in my thinking.

Mr. Moore: Your Honor, that is all I have at this time. [488]

Mr. Romley: There is one thing, not redirect. He may know about this office equipment, if he does I won't have to recall Mr. Jenkins.

The Court: Very well.

Redirect Examination

Q. (By Mr. Romley): Mr. Nelson, do you have any knowledge or information with regard to the office equipment normally used in an office such as the Duke City office?

A. We use similar equipment in our office.

Q. Have you ever been in that office?

A. Yes.

Q. And we speak of office equipment, you say that you have similar equipment in your office?

A. That is correct.

Q. Of what generally does such office equipment consist?

A. Basically desks, chairs, file cabinets, and some office machinery. That is like typewriters, adding machines, calculators.

(Testimony of Dale O. Nelson.)

Q. Things of that sort. Do you know the normal life of such equipment new?

A. My experience has been primarily in the public accounting field with the bulletin F that is supplied by the Internal Revenue Service as a guide for the depreciation of [489] various types of equipment.

Q. On the basis of that experience do you have an opinion then, sir, as to the normal life of such equipment?

A. I do.

Q. New?

A. New.

Q. And what is that, sir?

A. Desks are permitted to be written off over a twenty year period. Most office machinery would range from five to ten years. I think you could say that the average that is normally permissible is a ten year period.

Q. In an exhibit which has been, I believe, received in evidence here—let me see. Yes, 11. There is office equipment shown to be replaced or allowing it a six year life to be replaced at the end of the existing three years for the office equipment. I haven't asked you about that, but after you buy it new then to be replaced at the end of nine years, which gives it six year life in this depreciation schedule. As a matter of accounting now, does depreciating the office equipment in six years instead of in ten years react dollar-wise to the advantage or to the disadvantage of the defendants in this case?

(Testimony of Dale O. Nelson.)

A. It would act to the advantage of the defendants.

Q. To have it at the six year figure??

A. That is correct. [490]

Q. Now, I don't know when you last saw the office equipment in the Duke City office, can you tell us, sir? I don't know whether you are sufficiently qualified to express an opinion as to this used equipment or its normal life expectancy as of 1958.

A. Within the last two weeks, I would say.

Q. You did see it within the last two weeks, or two weeks prior to the sale?

A. No, within the last two weeks.

Q. Of course I assume you don't know whether it is the same identical pieces or whether it had been replaced?

A. No, I don't.

Mr. Romley: I wonder, if your Honor pleases, if we could inquire of counsel whether he could advise us on that point?

Mr. Moore: I am sure I can't. I haven't inspected it. I don't know any more about it than Mr. Nelson, in fact, not as much.

Q. (By Mr. Romley): The office equipment you saw about two weeks ago, sir, did it appear to be new or used equipment?

Mr. Moore: I think we are getting a little far afield. I object. The qualifications aren't laid.

Mr. Romley: I could call Mr. Liberman and find out if it has been replaced. I am asking you.

(Testimony of Dale O. Nelson.)

The Court: I think insofar as we are concerned with it [491] here, this exhibit probably covers it thoroughly enough anyway.

Mr. Romley: You may cross examine.

Recross Examination

Q. (By Mr. Moore): Just one question, Mr. Nelson. You referred to Bulletin F, I believe it was, a moment ago? A. That is correct.

Q. Did you follow Bulletin F in computing the depreciation schedule shown in these reports from 1952 to 1959?

Mr. Romley: That is immaterial, if your Honor please. I object to what bulletin they followed. We are concerned with what is the utility or life of the equipment.

Mr. Moore: He is relying on it, I want to know if that was followed in the preparation of the depreciation schedule in the reports.

The Court: He didn't make these reports, did he?

Q. (By Mr. Moore): Did you set up the depreciation schedule on the books of the Nagel Lumber Company, Mr. Nelson?

A. On some pieces of equipment. Anything that required, subsequent to the spring of 1956 I did.

Q. Everything from 1956 on down you set up the depreciation schedule?

A. That is correct.

Q. And directed the bookkeeping in reference thereto? [492] A. That is correct.

(Testimony of Dale O. Nelson.)

Q. Did you follow Bulletin F in setting up that depreciation schedule?

Mr. Romley: We renew our objection.

The Court: He may answer.

A. There are certain items primarily of a nature of office equipment, cars, rolling stock, on which we use a life term on which we rely on Bulletin F to a great degree. There are other items which are directly connected to the production of lumber on which we use the unit of production method.

Mr. Moore: That is all.

Mr. Romley: That is all.

The Court: We will stand at recess until 9:30.

(Whereupon, a recess was had at 4:30 o'clock p.m. on May 5th, until 9:30 o'clock a.m. May 6th, 1960.) [493]

May 6th, 1960, 9:30 O'Clock A.M.

The Court: Mr. Romley.

Mr. Romley: If it please the Court, I would like the record to show that we delivered this morning to counsel for the defendants the two letters he requested dated respectively on April 30th and May 12th, 1958. Those were the photocopies.

We have agreed upon a stipulation subject to the Court's approval, I will try to state it and counsel will correct me if I am in error.

It is stipulated by the parties that the Aztec timber governed by the contract between Duke City

and the Southwest Lumber Mills, Incorporated, provided that the timber would be cut within eight years after the date of the contract, which was May 21st, 1956, thereby requiring the cutting to be by May 21st, 1964.

We further stipulate that in the Fall of 1959, I believe it was you said, Mr. Moore?

Mr. Moore: Sometime in that area.

Mr. Romley: Duke City obtained an extension of the time within which to cut for a period of two years, I assume taking it to May 21st, of 1966.

We further stipulate, if the Court pleases, that the same situation prevailed or is their understanding, is the way I think Mr. Moore put it, that the same situation with [494] regard to timber for cutting, et cetera, prevailed with regard to the Aztec timber covered by the contract between Arizona Timber Company, the Gallagher concern, and the Southwest Lumber Mills. Is that correct?

Mr. Moore: I think that covers it, that's correct.

Mr. Romley: Now, at this time, if your Honor pleases, we would like to read into evidence interrogatory number 6 and the answer thereto as appears on page 2 of the answers to the interrogatories.

The interrogatory reads as follows:

“Question: State specifically and in detail the date and amount of each payment made upon the purchase price or under the terms of the purchase contract of November 6, 1958, on account of the purchase by defendants of the Gallagher properties.”

“Answer: Answered in detail in the schedule attached hereto marked schedule answering interrogatory number 6.”

And we offer in evidence, if the Court pleases, the schedule answering interrogatory number 6, pages 1, 2 and 3 thereof.

Mr. Moore: No objection.

(Plaintiffs' Exhibit 20 marked for identification.)

Mr. Romley: We offer in evidence, if the Court pleases, a photocopy of the interest tables appearing on pages 128 and 129 of the Volume 6 of the Arizona Code, 1939. [495]

The Court: I have the volume here if you want to see it, Mr. Moore.

Mr. Romley: It's 128 and 129.

Mr. Moore: We have no objection to that.

The Court: It may be received.

(Plaintiffs' Exhibit 20 received in evidence.)

Mr. Romley: If the Court pleases, I advised the Court and counsel yesterday that we had an actuary available to testify this morning. I find I was in error when I said this morning, although arrangements had been made for him to appear today he was tied up and couldn't be available until this afternoon.

Mr. Moore was good enough to consent this morning, subject to the Court's approval, that I could rest and put him on out of order this afternoon.

Mr. Moore: Well, I'm not through with Mr. Nelson.

Mr. Romley: You're not?

Mr. Moore: I had a few questions I wanted to ask Mr. Nelson before you rest.

Mr. Romley: May we finish this one point then?

Mr. Moore: Yes.

Mr. Romley: That's agreeable. Mr. Nelson, will you resume the stand, please. [496]

DALE O. NELSON

recalled to the stand as a witness, having been previously duly sworn, testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Moore): Mr. Nelson, you said yesterday that there are items in your equipment or equipment of the Nagel Company which are directly connected to production of lumber which you used the unit of production method in the calculation of depreciation. Will you tell us, please, what is the unit of production method, describe how that works.

A. The unit of production method is based on the projected volume to be produced by any manufacturing concern and by a particular unit of equipment. And as the material is manufactured the charge for depreciation is written off as that volume is produced.

Q. How do you determine mathematically, is it by dividing the value?

A. Dividing the value by the total volume to get a unit of production.

(Testimony of Dale O. Nelson.)

Q. By the total volume, and that gives you the unit of production?

A. Unit of depreciation.

Q. Unit of depreciation I meant. If we are talking of [497] timber or lumber you would use your projected total volume? A. That's correct.

Q. And the value of the particular piece or pieces of equipment? A. That is correct.

Q. You would then get the amount of depreciation per thousand feet of lumber?

A. That is correct.

Q. And then at the end of the year whatever number of thousands of feet of lumber you had manufactured you would charge off as depreciation against the equipment involved on that basis?

A. That is correct.

Q. Can you tell me, Mr. Nelson, what parts of the machinery and equipment you referred to when you said those items were directly connected to the production of lumber? Let me ask you this, maybe this will help, Mr. Nelson, do you have with you among your files down here your worksheets or records of depreciation schedule, the way you worked it out? A. No, we don't.

Q. Are those worksheets voluminous?

A. We keep an equipment ledger. Each individual piece of equipment is recorded on a ledger page and the method of depreciation is computed on that page. [498]

(Testimony of Dale O. Nelson.)

Q. How large a ledger is that?

A. Probably an inch and a half thick on ten by ten sheets.

Q. Could you get that down here by the first of the week? A. I believe so.

Mr. Moore: I would like, if you have no objection, Mr. Romley, for Mr. Nelson to obtain that.

Mr. Romley: We have no objection at all.

Q. (By Mr. Moore): That ledger will contain your worksheets or at least final information from your worksheets, I assume?

A. No, the ledger has no summaries in it.

Q. Will you also get your worksheets?

A. For what periods?

Q. Well, I believe you said you had, was it '56, after '56 I believe you said that you had made up the depreciation schedule?

A. That is correct.

Q. Get '56 up to date, if you have it.

Can you tell me, Mr. Nelson, do you recall in '56 what volume of timber you used in calculating the unit of production depreciation?

Mr. Romley: That is not the best evidence, your Honor. If we are going to get the records, rather than rely [499] on memory. Object to it on that ground.

The Court: I think if we are going to have the records, we ought to have them here for the witness to answer from those.

(Testimony of Dale O. Nelson.)

Q. (By Mr. Moore): This ledger you are talking about, how far back does that go, do you recall?

A. It contains any equipment that is on the yard now. At the end of each year any equipment that has been disposed of is removed from the ledger.

Q. Do you know whether or not there are available the worksheets from which those depreciation, the depreciation ledger was prepared, available from '53 or '4, on up to date?

A. I don't know where those are, no, unless they would be in the auditor's files.

Q. And those files, you are referring to files kept by the auditors some place other than your office at Winslow? A. That's correct.

Q. So far as you know the only worksheets you have would be from the time you started?

A. That is correct.

Q. Let me ask you this. Will this ledger show which items of equipment or pieces of equipment are depreciated according to the use of Bulletin F that you mentioned yesterday?

A. As I stated, each individual page shows the method or [500] the rate of depreciation.

Q. If it is on a life basis, useful life basis rather than unit of production basis, will the ledger show the span of life used in determining the depreciation on that particular piece of equipment?

A. It will in each case.

(Testimony of Dale O. Nelson.)

Q. Mr. Nelson, is the Nagel Lumber & Timber Company borrowing money or have money borrowed at the present time? I am not interested in the amount, I am ultimately going to get to the interest rate, that is what I have in mind.

A. We are.

Q. What interest rate are you paying?

A. We have some at five and some at six per cent.

Q. Do you have this warehousing or warehouse receipts, do you have some of those at six per cent?

A. Yes.

Q. In addition to that six per cent, are you also paying a two per cent service charge? A. No.

Q. No service charge on the warehouse receipts?

A. No, pay a one per cent service charge.

Q. One. I misread the book. Six per cent interest and one per cent service charge, is that correct?

A. The service charge is not on the amount of the loan.

Q. What is the service charge on? [501]

A. On the amount of the security.

Q. And that is a part of the charge that you pay for the use of the money, however, isn't it?

A. Yes.

Q. Mr. Nelson, in 1958 or '59, which was it, the Nagel Lumber & Timber Company bought a plant at San Carlos, do you recall when that was acquired? A. 1959.

(Testimony of Dale O. Nelson.)

Q. That was bought or acquired with the intention or expectation of earning profits out of that operation, I assume?

Mr. Romley: We object to that, entirely immaterial, has no probative value, another plant not valued in these calculations.

The Court: I don't see the materiality.

Q. (By Mr. Moore): Let me ask you this. Does not your financial report for the year ending December 31, 1959—I don't recall the exhibit number—7-I, Exhibit B, I believe page 1959-4 shows a loss of \$86,000 in 1959 in the operation of the San Carlos plant?

A. What was that page again?

Q. Excuse me. I believe Exhibit B, I think it is 1959-4, if I can read it on this photostat.

A. Now, could I have the question again?

Q. Does that show a net loss of \$86,899.17 on the [502] San Carlos mill for '59?

A. It does.

Q. Schedule 6, page 1959-23.

A. I have it.

Q. That shows sales manager's salary of \$18,718.65, is that correct, for the year 1959, that is sales manager of Nagel Lumber & Timber Company?

A. I would say this would be a misnomer. We do not pay our sales manager this salary. This is the entire sales force.

Q. Sales force and not the manager?

A. That's correct.

(Testimony of Dale O. Nelson.)

Q. Do you know why it would be set up here as sales manager's salary, that figure?

A. No, I don't.

Q. Right beneath that is office salaries, \$27,000. Is that a misnomer or is that correct?

A. That is correct.

Q. That covers the office salaries of personnel in the office at Winslow? A. That is correct.

Q. Is there any sales force or office help included in that office salary figure?

A. No, there are no sales personnel.

Q. I didn't hear you. [503]

A. There are no sales personnel included in that figure.

Q. Explain to me, Mr. Nelson, you can do that better than I can ask specific questions, what is the sales manager's figure of \$18,718?

A. We have a salesman stationed in the Phoenix area. We also have a salesman who is located at Winslow, combination of those two men's salaries.

Q. Is that their total compensation, or is that their salary and they have some commission arrangement charged up somewhere else in this book on sales expense?

A. No, this includes any commission arrangement and salary. This includes both the commission arrangement and salary.

Q. Going back a moment, Mr. Nelson, to this question of warehouse receipts. The service charges you mentioned are on various items?

(Testimony of Dale O. Nelson.)

A. Yes.

Q. Can you tell me the total cost or point out to me where it would appear if it does appear on this Exhibit 7-I, the total cost of all charges and costs in connection with warehouse receipt loans?

A. It wouldn't be stated as a single figure.

Q. Would the total be shown any place?

A. The major portion of it would be shown under yard cost miscellaneous. [504]

Q. Where is that? A. 1959-20.

Q. This is schedule of production costs for San Carlos, is that Schedule 4?

A. Pardon me, a little too fast.

Q. Those pages are hard to read on some of these photostats. A. 1959-18.

Q. That is Schedule 3 continued at the top?

A. That is correct.

Q. Schedule of production costs, Winslow, continued? A. That is correct.

Q. That identifies the sheet?

A. That miscellaneous figure is not made up solely of those charges. [505]

Q. Under yard expense next to the bottom, you mean where it says miscellaneous?

A. That's correct.

Q. The \$12,000 figure you said what about it? It is not made up?

A. It is not made up solely of the service charges on the warehousing.

(Testimony of Dale O. Nelson.)

Q. How much of it is charges on warehouse receipts?

A. Without a detailed analysis I couldn't tell you.

Q. You have no recollection of it in which you could approximate it?

A. I know the other items that are basically contained in it. That would be the salary of the two men who are employed by Lightning warehouse, and under the terms of their warehousing agreement.

Q. Do you know what those items totaled, approximately? A. No, I couldn't say.

Q. Well, now, where else would the service charges appear in here, if any place in this report?

A. I am not certain, but the original reference I gave you, yard cost, miscellaneous, San Carlos could contain a very small part of it.

Q. And that's the figure at the bottom under yard cost, thirteen hundred thirteen?

A. That's correct. [506]

Q. Is there any place else, Mr. Nelson, in this exhibit where those service charges would be reflected? A. I don't believe so.

Q. Do you consider warehouse service charges as a financial expense rather than yard expense in the keeping of your records?

A. No, we consider them as shown on this statement as an operating expense.

(Testimony of Dale O. Nelson.)

Q. As an operating expense separate and apart from the charges which you show on the warehouse receipts? A. That's correct.

Q. Is there any reason why you carry those charges under operating expense under yard expense rather than under financing expense, or whatever the proper title in your record is, in this report is?

A. Well, other than the fact that this service charge is not a true interest expense, the Internal Revenue regulations regarding that type of charge quite clearly stipulate that service fees are not to be considered as interest, they are a deduction.

Mr. Moore: Give me just a moment, if your Honor please.

Q. (By Mr. Moore): Then, Mr. Nelson, if I understand you correctly, so far as you know the interest rate independent of service charges, are those the ones that you refer to that [507] appear on page 1959-6? A. That is correct.

Mr. Moore: I think that's all.

Redirect Examination

Q. (By Mr. Romley): Mr. Nelson, I believe you said that the San Carlos operation commenced in 1959, or did you say, sir? A. I did.

Q. Is timber for that forest supplied from the Sitgreaves National forest or from another forest?

A. It's supplied from another forest.

(Testimony of Dale O. Nelson.)

Q. Was it purchased by—I'm speaking of the San Carlos plant—by the Nagel Lumber & Timber Company alone? A. No.

Q. Did the Nagel Lumber & Timber Company put up any cash in connection with that purchase?

A. Yes.

Q. How much?

A. In the immediate vicinity of \$200,000.

Q. In cash. Now, what did you mean when you said it was not purchased by the Nagel Lumber people?

A. I thought you were referring to the timber involved.

Q. Well, now, what is your complete answer, then, sir? Was the San Carlos plant purchased by Nagel people alone? [508]

A. The plant was purchased solely by the Nagel Lumber & Timber Company?

Q. And some others are purchasing timber too?

A. No, there was timber under contract that I was trying to bring out, it was previously under contract when we purchased it so this had been purchased by someone else. We assumed the contract.

Mr. Romley: That's all.

Recross Examination

Q. (By Mr. Moore): When was the San Carlos mill purchased?

A. The end of March, 1959.

Q. And I don't think I understood you, Mr. Nelson.

(Testimony of Dale O. Nelson.)

Was the entire mill purchased by the Nagel interests or merely a half interest or some other interest in it?

A. The mill and timber was purchased by the Nagel Lumber & Timber Company by itself. There were no other parties.

Q. From what forest was the timber furnished or from what forest does the timber come that is milled at the San Carlos mill?

A. From the San Carlos Indian reservation.

Q. And is that stumpage arrangement there advertised and handled similar to Forest Service, or is that a different setup entirely? [509]

A. It is quite similar.

Q. Is it put up for competitive bidding similar to the Forest—

A. As I understand, it is.

Q. —Similar to the Forest Service sales?

A. That's correct.

Q. Do you know when the timber cutting rights were acquired which were sold to Nagel in this transaction?

A. At the same time that the mill was purchased.

Q. I don't think I make myself clear, Mr. Nelson.

Did you acquire contracts along with the mill, and if so when were those contracts made and when was the sale held, that's what I'm trying to get at?

A. I don't have those details clearly in mind. There was one contract that was in force at the time we purchased the San Carlos mill.

(Testimony of Dale O. Nelson.)

Q. Do you recall—

A. It's dated back into 1958 sometime as I recall.

Q. 1958? A. Yes.

Q. And is that the only contract that was, as you have put it, in force at the time that you recall now? A. That's the only one.

Q. Had there been any sales of timber in that forest since Nagel acquired the San Carlos mill?

A. There has been one. [510]

Q. When was it? A. (No answer.)

Q. Approximately, I don't mean the exact day, Mr. Nelson.

A. I'd say in the Fall of 1959.

Q. Are those sales advertised in the same or similar manner as Forest Service sales?

A. They are.

Q. Do you know in which newspaper the notice of the sale on the San Carlos matter was published?

A. No, I don't.

Q. Where is the mill located with respect to San Carlos or some other geographical point that you can point out for me?

A. It's located on Highway 70, I believe it's about 18 miles east of Globe?

Q. East of Globe?

A. Yes. If you can find the town of Peridot, P-e-r-i-d-o-t, on the map, we are within about two miles of this mill.

Q. I'm sorry, the paper was rattling, I missed the name of the town.

(Testimony of Dale O. Nelson.)

A. Peridot, P-e-r-i-d-o-t.

Q. What is the available or what is the amount, if you know or have any information about it, as to available timber in forests from which timber is taken for this mill? [511].

Mr. Romley: I'm sorry, I didn't get that question.

Mr. Moore: I don't think it was very clear.

Mr. Romley: I didn't hear it, I wasn't complaining otherwise.

Q. (By Mr. Moore): What information do you have, Mr. Nelson, with respect to the total volume of what might be called available timber in the forest which serves the San Carlos mill?

A. I had heard those figures mentioned orally, I didn't make any mental notes to recollect them. I can't tell you.

Q. Are any other mills located—what forest is that, is that called the San Carlos Forest or the San Carlos Indian Reservation Forest or what is the name of it?

A. Specifically I don't know. We refer to it as the San Carlos Indian Reservation Timber.

Q. I was trying to get the name merely to simply identification. Are there any other mills located in that forest or close to it anywhere?

Mr. Romley: Just a moment, if your Honor please, I haven't heretofore objected, I thought perhaps this was going to be a short subject. I fail to see any materiality or any probative value, anything connected with this timber. I therefore object.

(Testimony of Dale O. Nelson.)

The Court: The objection is sustained.

Q. (By Mr. Moore): At the sale, last sale you mentioned [512] was Nagel Lumber & Timber Company the only bidder at that sale?

A. That is my understanding.

Mr. Moore: I think that's all.

(Plaintiffs' Exhibit 21 marked for identification.)

Mr. Romley: If your Honor pleases, Mr. Kirkpatrick testified about a sale to be held very shortly. He didn't state the date except he said it was in the process of now being noticed, and he said the notice appeared thirty days. I have here and hand to counsel Plaintiffs' Exhibit 21 for identification entitled "National Forest Timber for Sale," which relates to the sale on May 31st, this year, in the Sitgreaves National Forest concerning which Mr. Jenkins said the Nagel Lumber & Timber Company would not bid. It's from the Chevalon working circle.

Mr. Moore: Does this show that there won't be any other bids or any competitive bidding of any kind?

Mr. Romley: I don't think I could show that, Mr. Moore.

Mr. Moore: I wondered from your statement if it might not be in here. If this is correct, I have no objection to it.

Mr. Romley: If you have another one, I will offer it instead. [513]

Mr. Moore: I don't see the relevancy or materiality.

The Court: I don't either, Mr. Romley. What is it offered for?

Mr. Romley: To show that this timber is available. Of course that's already in evidence. This is corroborated.

The Court: He testified to that, he wasn't attacked on it.

Mr. Romley: That's true, your Honor. It is, in addition to what Mr. Kirkpatrick said, it does give a date of the sale and I think that may be pertinent, you Honor will note from the exhibit in evidence that we refer to some future timber under a contract to be awarded on May 31st, 1960, and that is this one. It ties in with that. If it could be received for the date only that I think may be additional to what we have in the record.

The Court: All right, it may be received.

(Plaintiffs' Exhibit 21 received in evidence.)

Mr. Romley: Subject to the actuary matter we discussed earlier, your Honor, the plaintiffs rest.

Mr. Moore: And that's the only reservation is just an actuary on interest rates?

Mr. Romley: Yes, that is correct. Now, I might—that brings to mind this one thing: I want to be sure we've produced everything we have agreed to produce. I understand Mr. Moore wants on Tuesday the depreciation ledger and the [514] worksheets with regard thereto from 1956 to date.

Mr. Moore: I'd like to have it Monday if we could get it Monday.

Mr. Romley: Well, if we can we will get it to you by Monday. Now, I did say yesterday that we could produce, if desired by counsel, the records at Winslow reflecting the net log scale, gross log scale—well, the gross log scales are in evidence but the net log scale on which we figured our 15 percent overrun. I'm not sure from the present state of the record whether counsel wishes me to produce those, and since I don't want to refuse him any reasonable request I'd like to know.

Mr. Moore: Your Honor, I never saw Mr. Romley so willing to produce records.

The Court: Well, do you want them, Mr. Moore?

Mr. Moore: They are not a part of my case. If Mr. Romley wants them in his lawsuit it's his evidence.

The Court: Very well.

Mr. Romley: I think I understand it.

The Court: That will be understood as the statement that counsel doesn't want them. With that, you rest, Mr. Romley?

Mr. Romley: Yes, your Honor.

(Plaintiffs rest.)

Mr. Moore: Your Honor, at this time I don't want to [515] take up a lot of the Court's time but I do think I should make a motion.

The Court: Very well.

Mr. Moore: At the close of the plaintiffs' case the defendants move the Court for an order dismissing the complaint and for judgment upon the grounds and for the reasons that the complaint is

based upon an alleged breach of a written contract, that the evidence does not sustain the breach of that contract which, as a factual basis, would authorize the assessment of damages except only in one instance giving the plaintiffs the inferences which they are entitled to on their evidence, and that is the breach of an agreement to acquire an undivided half interest in a saw mill and real estate and possibly, even though I don't believe the evidence shows that, standing timber.

And upon that part of the lawsuit, if there is an inference from the plaintiffs' evidence which would sustain a finding that there has been a breach of that agreement, then the plaintiffs' own evidence discloses conclusively that there has been no damage for the reason that the measure would be the difference between the contract price and the market price, and as I remember the evidence and testimony of Mr. Jenkins, being the only evidence on this subject, he put a reasonable value of \$500,000 on the mill and the contracts in evidence show that \$650,000 was paid for it. [516] So that the purchase price was in excess of the plaintiffs' evidence as to reasonable value of the mill.

There has been no evidence, not a word as to the market value of standing timber.

Now, we further make our motion upon the further ground, if your Honor please, that insofar as there is any contention or possible contention by the plaintiffs on the evidence now in the record

that it would justify a finding and an assessment of damages with respect to the loss of prospective future profits, that there is no evidence in the record which would make the legal foundation upon which the Court could make such a finding and make such an assessment.

I don't want to take the time to review in detail other than to point out to your Honor that there is no evidence whatever that there was any agreement with respect to forming a partnership, forming a joint venture, forming a corporation, capitalizing the business, managing the business, sales policies, carrying inventories and a multitude of other things which go into an agreement with respect to the operation of a business. It was not discussed and the plaintiffs' own words are: "All we had was the option to purchase." Now, clearly, if your Honor please, I cannot see any theory whereby this evidence would sustain an alleged breach of an agreement to make an agreement where the items involved therein are as vague and indefinite and uncertain as [517] this would be in this case.

Plaintiffs' counsel probably will contend that under the evidence that he read out of the deposition of Mr. Liberman, that that constitutes an admission that they agreed to buy a going business. What did he buy? He bought a physical plant, physical timber, he didn't buy customers, he didn't buy products, he didn't buy sales force, he had no right to any customers, no operation and the foundation necessary to sustain the theory of the purchase of

going business is not in evidence. If it is, if I am wrong about that, then there is no evidence whatsoever with respect to an agreement as to what would be done with it.

I think that covers my thoughts at the moment, if your Honor please, and the grounds of our motion.

The Court: I will reserve ruling on the motion.

Mr. Moore: It would help me, I think I will save some time and I think we can go straight until noon if your Honor would give us a few minutes.

The Court: Very well. We will take the regular morning recess at this time.

(Short recess.) [518]

YALE WEINSTEIN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): Will you state your name?

A. Yale Weinstein.

Q. Where do you live?

A. Albuquerque, New Mexico.

Q. What is your occupation?

A. I am a professional forester.

Q. By whom are you employed?

A. Duke City Lumber Company.

Q. In what capacity?

A. I am the production manager over a phase of our operations, acting as general assistant to Mr. Maurice Liberman.

(Testimony of Yale Weinstein.)

Q. Mr. Weinstein, give us your educational background, please, sir.

A. I graduated from the School of Forestry, University of Minnesota, in 1937. I re-entered, was readmitted to the University of Minnesota in 1942 in the graduate school, did part-time graduate work and acted as instructor in the department until late 1942 when I entered Military Service [519] in the United States Navy. Following discharge from the Navy, I once again was associated with the School of Forestry at the University for a period of 1947 to 1952 on a part-time basis.

Q. When you say the University, you mean the University of Minnesota?

A. The University of Minnesota, yes, sir.

Q. What experience have you had in your employment in your field, by that I mean, give me your employment, by whom and what periods of time?

A. Following graduation from the University of Minnesota School of Forestry I was employed by the New Mexico Timber Company, Bernalillo, New Mexico.

Q. Are those companies that were operated or managed by Mr. Tom Gallagher?

A. Yes, sir.

Q. Proceed.

A. In connection with my employment by New Mexico Timber Company I was charged with the responsibility of the management of some 200,000

(Testimony of Yale Weinstein.)

acres of privately owned timber land, the portion of which was owned, both land and timber, by New Mexico Timber Company, an area of approximately 100,000 acres on which New Mexico Timber Company merely had cutting rights.

Q. Was that in Arizona or New Mexico or both?

A. That was in New Mexico, sir. My duties also [520] consisted of procurement and acquisition of additional supplies of timber which largely involved relationships between New Mexico Timber Company and various Federal agencies who owned or controlled the timber, namely the United States Forest Service, the Bureau of Indian Affairs, the Bureau of Land Management.

Q. How long did you continue to work for the New Mexico Timber or Bernalillo?

A. I continued my employment with New Mexico Timber Company from 1937 to a period of 1942, I was awaiting call to Military Service and by mutual agreement left their employ to spend a short time at the University of Minnesota School of Forestry prior to my entrance into Military Service.

Q. After your Military Service did you go back to the employ of New Mexico Timber Company or Bernalillo, or both?

A. I went back into the employ of New Mexico Timber Company.

Q. About when was that, Mr. Weinstein?

A. That was December of 1946, following my discharge from Military Service.

(Testimony of Yale Weinstein.)

Q. How long did you continue in the employ of New Mexico Timber Company?

A. At that particular time I continued in the employ of New Mexico Timber Company for a period of approximately one year. [521]

Q. Then by whom were you employed, or what did you do?

A. I left the employ of New Mexico Timber Company in 1947 and it was during this period I was reassociated with the School of Forestry on a part-time basis.

Q. Then did you go back into the employ of New Mexico Timber at a later time?

A. I did, sir. During 1952 and during this period I was gone I had retained association and contact with the New Mexico Timber Company or Gallagher's company, by reason of matters I had been familiar with as a result of my previous association, I had corresponded and consulted with them on various matters I was familiar with and reentered their employ in 1952.

Q. And continued in their employ until when?

A. I continued in their employ until December 15, 1958.

Q. And then by whom were you employed from December 15, 1958?

A. From December 15th, 1958, to the present date, I was employed by the Duke City Lumber Company.

Q. In the capacity you have heretofore stated?

(Testimony of Yale Weinstein.)

A. Yes, sir.

Q. You are familiar, are you, Mr. Weinstein, with what we have referred to here in the courtroom for a few days as Aztec timber?

A. Quite familiar, sir. [522]

Q. Would you very briefly, and I mean briefly, not all the history, but give us a little history of the Aztec timber, and that is the ownership of it and by whom it was acquired and how it happened to be sold to the various people we have mentioned here?

A. I will, sir. In approximately 1955 it became known to us that there was a possibility there was a substantial acreage within the boundaries of the then Sitgreaves National Forest and Coconino National Forest, which was in litigation so far as ownership was concerned. We learned these were lands covered under the terms of the original land grant act to the railroads and that the Atlantic & Pacific Railroad Company, succeeded by the Santa Fe Railroad, had made selections of public domain lands. The selections had been made and apparently granted, however, the title had not passed. We learned that the Aztec Land & Cattle Company succeeded the rights of the railroad in the ownership of these lands. It was our information that Aztec Land & Cattle Company through legal means was trying to reacquire or acquire the ownership of these lands, the case having been heard in court

(Testimony of Yale Weinstein.)

and later appealed and finally taken to the Supreme Court where a review was denied, sustained the position of the Aztec Land & Cattle Company. It became apparent then that approximately 100,000 acres of Federal lands, that which we thought were Federal lands within the [523] boundaries of the Sitgreaves and Coconino National Forests were now to become privately owned by Aztec Land & Cattle Company.

Q. Did those lands become owned, ownership of those lands pass to the Aztec Land & Cattle Company?

A. The title passed to the Aztec Land & Cattle Company, yes, sir.

Q. Then trace for me now that timber from the Aztec Land & Cattle Company into the hands of the parties we have discussed, the Bernalillo and Nagel and so forth.

A. As a prelude to that the Aztec Land & Cattle Company had local representation in the form of Mr. Thomas W. Cabeen, who I believe is secretary of the Aztec Land & Cattle Company with residence in Albuquerque. When this private ownership became known to us we entered into some negotiations with him toward the acquisition of some of these Aztec lands.

Q. At that time, you say "we," at that time you are referring to New Mexico?

A. Yes, at that time, if I may refer to it as the Gallagher companies.

(Testimony of Yale Weinstein.)

Q. Yes.

A. The Gallagher companies entered into some negotiation for the acquisition of some of these lands, and did purchase land and timber, two sections——

Q. Before we do that, I haven't offered that in evidence [524] yet. We will then allow you to explain the map.

A. All right, sir. There were other negotiations where Whiting Brothers or one of their companies, the Whiting group, purchased a portion of the Aztec lands, both land and timber.

Q. So some of our exhibits or the exhibits the plaintiffs have offered, I believe they are in evidence, one of them at least will be clear, did the Southwest Lumber Mills first acquire ownership to the Aztec lands and then by contracts sell parts of it to Duke City and parts to New Mexico and parts of it to Nagel?

A. Yes, sir, that is correct. This prelude I referred to were two acquisitions by the Gallagher companies and Whiting companies. A substantial portion of the Aztec lands still remained in the ownership of Aztec. And Southwest Lumber Mills, Incorporated, acquired the ownership of land and timber for the balance of the Aztec lands that were available, as insofar as the Gallagher companies were concerned we were advised by Mr. Jim Edens, president of Southwest Lumber Mills, that those

(Testimony of Yale Weinstein.)

lands that fell within the Chevalon working circle were going to be made available to anyone who might be interested in those. And in the course of this timber being offered for sale, we learned that within the Chevalon working circle, Duke City Lumber Company had already made commitment to acquire a volume of 60,000,000 feet. We learned [525] that Nagel Lumber & Timber Company had committed themselves toward the purchase of a volume of 75,000,000 feet and ultimately the Gallagher companies, the Gallagher interests, committed themselves for the purchase of 35,000,000 feet.

Q. Now, I wonder if we might have this large map that is now on the board marked as an exhibit?

Mr. Romley: We have no objection to it being marked directly in evidence, your Honor.

Mr. Moore: If it is proper and convenient to the Clerk, she can give me the number and I can put it on the board.

(Defendants' Exhibit D marked in evidence.)

Q. (By Mr. Moore): Mr. Weinstein, I am directing your attention to this large map which will be referred to hereafter as Defendants' Exhibit D. Did you at my request put maps together and make up this map with these colorings and so forth on it?

A. I did, sir.

Q. Now, with the pointer will you first outline for the Court the boundaries of the Chevalon working circle as shown on this exhibit. And name them as they may appear on the map.

(Testimony of Yale Weinstein.)

A. By way of information, Mr. Moore, this transcription, this map was transcribed from the map that accompanies the Forest Service Management Plan. The west boundary of the [526] Chevalon working circle is represented by Leonard Canyon, which also acts as boundary between Coconino National Forest and the west boundary of the Sitgreaves National Forest.

Q. You are referring to the large dark line to the left and west side of the map?

A. Yes, sir. The south boundary of the Chevalon working circle is this heavy black line to this point which is——

Q. On the map, if I may assist you, Military Sink Hole, whatever that may be.

A. That is right.

Q. That will identify the point on the map?

A. That is right.

Q. That is the so-called southeast corner of the working circle?

A. That is the southeast corner of the working circle, yes, sir. The east boundary of the working circle is the west Chevalon, is the Chevalon Canyon which is represented by a lighter brown line and extends to the northeast corner of the working circle, which is also the north boundary of the Sitgreaves National to a point on the north boundary of the Sitgreaves National Forest.

Q. Then is the northern boundary on the part that is pulled back over the board there——

(Testimony of Yale Weinstein.)

A. The north boundary is the north boundary of the Sitgreaves National Forest, yes, sir. That is the Chevalon [527] working circle. As a matter of convenience and reference, the working circle is then broken down into two blocks within the working circle.

Q. Is that also done in the management plan that Mr. Kirkpatrick discussed?

A. Yes, sir.

Q. Now, will you show and explain the two blocks as they appear on the map?

A. The two blocks that are referred to in the Chevalon working circle management plan are the Big Chevalon block and Leonard Canyon block. The Leonard Canyon block is that portion of the Chevalon working circle which lies west of a drainage known as Willow Creek, and it is represented by this blue line which runs approximately in a generally north-south direction through the working circle.

Q. Excuse me, Mr. Weinstein. Is this also—you said designated by the blue line—is it also designated on the map by the words "Willow Creek"?

A. It is so designated, Mr. Moore.

Q. Thank you.

A. That, sir, is the Leonard Canyon block. The balance of the Chevalon working circle or east of the Willow Creek drainage is the Big Chevalon block of the Chevalon working circle.

(Testimony of Yale Weinstein.)

Q. Now, you have various colored sections on this map. [528] Will you just in your own way explain those, what they are and what they represent?

A. The colored sections on the map indicate a portion of the Aztec lands upon which Duke City, Nagels and the Gallagher companies had cutting rights. This portion which I have represented in the yellow colors are the Duke City Aztec sections.

Q. And that is to the western side of the working circle?

A. That is the extreme western side of the working circle and in some cases on the extreme side of the Sitgreaves National Forest where it adjoins the Coconino National Forest. There are other sections that are indicated in the blue color and these are sections of Nagel Aztec, these being only a portion of the 75,000,000 feet which was acquired by them.

Q. That was what I was going to ask you. This you have in blue is the Nagel Aztec timber in the Leonard Canyon block?

A. In the Leonard Canyon block, yes, sir.

Q. Proceed.

A. These sections which I have indicated in red were the Gallagher Aztec sections that were available at the time that there was a transfer from the Gallagher company to the Duke City Lumber Company.

Q. And that is Aztec timber Gallagher owned?

(Testimony of Yale Weinstein.)

A. That is Aztec timber Gallagher owned, yes, sir. [529]

Q. As of the date of the transfer to Duke City?

A. That is right, sir.

Q. All right.

A. There are some additional Aztec sections that are not shown on this map inasmuch as they do not lie within the Chevalon working circle.

Q. What do you mean there are some other sections? Are they involved in the transaction we are here about in any manner?

A. I believe that they are, Mr. Moore.

Q. Will you tell us about them?

A. This particular map does not cover the location of those sections, but in the transaction between the Gallagher companies and Southwest Lumber Mills for 25,000,000 feet, these volumes were based upon a cruise and by understanding with Southwest—

Q. Excuse me just a minute, Mr. Weinstein.

A. Yes, sir.

Mr. Moore: I wonder if this might be marked as Defendants' Exhibit E. Do you have any objection to this?

Mr. Romley: I have never seen it before.

Mr. Moore: Do you want a chance to check it?

Mr. Romley: No, if it is going to be explained I have no objection.

(Defendants' Exhibit E marked in [530] evidence.)

(Testimony of Yale Weinstein.)

Q. (By Mr. Moore): Referring to Defendants' Exhibit E, tell us what this is?

A. This, sir, is a map that shows all of the Aztec sections that were involved in the entire transaction between Southwest Lumber Mills and the three companies which I previously named, Duke City, Nagel Lumber & Timber Company and Gallagher companies.

Q. Very briefly, Yale, what are the colorings on this map?

A. The colorings on this map conform to the colorings on the exhibit—what is that, sir?

Q. D:

A. Exhibit D, inasmuch as D merely shows the sections within the Leonard Canyon block, this shows all of the Aztec sections within the entire working circle plus the two sections outside the Sitgreaves National Forest.

Q. Let me ask you about the notes on the margin, you have red and symbol marked "sawmill." Does that define the markings on the map, the sawmill?

A. Yes, sir. On this particular map, sir—the overall green in this is the boundary of the Sitgreaves National Forest. The sawmill symbols indicate the location of two sawmills within the boundaries of the Sitgreaves Forest. There are others but I have merely shown these two, one at Heber or Overguard and another one at Heber. Insofar as the [531] blue represents all of the Nagel Aztec

(Testimony of Yale Weinstein.)

sections, both Leonard Canyon block and Big Chevalon block; the red colors represent the allocation by the Gallagher companies and the yellow represents the acquisitions by the Duke City Lumber Company.

Q. Mr. Weinstein, you mentioned two sections that did not appear on Exhibit D. Will you point those out on Defendants' Exhibit E and explain those?

A. These are the two sections which lie within the boundaries of the Coconino National Forest. The allocations——

Q. You can explain those now without the map.

A. Yes, sir. The allocations of timber between the various companies were based upon a cruise and without going——

Q. Excuse me just a second. [532]

Q. (By Mr. Moore): Now, will you, please, Mr. Weinstein?

A. The allocations of the timber were based upon a cruise and during the course of the cruise, without going into too much detail, Mr. Moore, the timber cruisers arrived at what was known as an assumed net volume, this net volume—assumed net volume was used as a basis for making the allocation between the various companies who had committed themselves to purchase the timber from Southwest.

In the course of negotiations between the Gallagher companies and Southwest, it was agreed that

(Testimony of Yale Weinstein.)

if there was insufficient amount of timber available within the Chevalon working circle——

Mr. Romley: Just a moment, just a moment, if your Honor please. I don't know where this is leading us.

Mr. Moore: It explains the transfer.

Mr. Romley: It would not be the best evidence. I don't know where it's going, so I must object. It's not the best evidence.

Q. (By Mr. Moore): Do we have a copy of the agreement you are referring to?

A. No, sir.

Q. Would you tell——

Mr. Romley: Does that have any direct materiality here?

Mr. Moore: Simply to show—— [533]

Mr. Romley: If it's just background, I will make no objection.

Mr. Moore: It's simply to show why there were two sections over in Coconino, Mr. Romley. As I understand it, there was defects that the volume wasn't there, and they transferred these two sections to make up for the deficiency.

Mr. Romley: For that part of it I have no objection.

Q. (By Mr. Moore): Proceed very briefly, Mr. Weinstein, to identify the two other sections?

A. These two sections, there was an understanding between Southwest and the Gallagher Companies that if there was insufficient timber within the boundaries of the Chevalon circle to make up the

(Testimony of Yale Weinstein.)

25,000,000 which they had agreed to purchase, and Southwest had agreed to sell them, then Southwest agreed to make available to them from outside of the boundaries of the Chevalon working circle on their own Aztec timber from the Coconino National Forest.

Q. And that is the reason for there being two sections in the Coconino National Forest outside of the Big Chevalon working circle?

A. That is correct, sir.

Q. Now, will you indicate on Defendants' Exhibit D, Mr. Weinstein, how far it is—I think the mileage shows there. Where is the main road from Winslow into the working circle indicated on that map? [534]

A. The main road from Winslow is the main road that shows coming in a generally southwesterly direction on this map which we refer to as Road Number 34. It comes from Winslow to this point which is more or less headquarters for the Chevalon working circle, the Chevalon Ranger Station.

Q. Chevalon Ranger Station, yes, that appears there, Chevalon R. S. on the map?

A. It is the section one, township thirteen north, range 13 east of the working circle.

Q. How far is it from Winslow to the Chevalon Ranger Station in miles?

A. It is approximately 45 miles.

(Testimony of Yale Weinstein.)

Q. All right. Now, show us the other roads as they appear on that map?

A. The main road or road number 34 proceeds in the same general direction to the south boundary of the working circle where it intersects with that which we refer to as the rim road which then carries you both east and west into the Coconino National Forest. The rim road proceeds in an easterly direction and ultimately drops off this geographical—

Q. That's what we call the Mogollon Rim?

A. That is the Mogollon Rim that drops down into the Tonto Basin country.

Q. Could you point out the roads into the Leonard Canyon block as they exist now? [535]

A. As they exist now there is a main road which is referred to as the Wiggins crossing road from this point approximately in the vicinity of the Chevalon Ranger Station generally west to the Willow Creek Canyon.

Now up until last year the Willow—the Leonard Canyon was inaccessible from a practical standpoint insofar as logging is concerned by reason of the fact that there was no road, no road across Willow Creek.

Q. But there has been built now a bridge across the Willow Creek?

A. There has since been constructed a road which crosses the canyon with a bridge across Wil-

(Testimony of Yale Weinstein.)

low Creek and the main road and some minor logging spur roads have been built into the face of the Leonard Canyon block.

Q. Now, that road and that Willow Creek crossing, was that a cooperative project with the Forest Service and Duke City and Nagel?

A. Yes, sir.

Q. And maybe someone else, I don't know?

A. It was a cooperative project between Nagel Lumber & Timber Company, the Duke City Lumber Company and Southwest Lumber Mills and the United States Forest Service.

Q. That is by cooperative, each of them helped pay the cost of building it, is that what you mean?

A. They each contributed, they each contributed to the [536] cost on that on the basis of a cooperative agreement which was drawn up and signed.

Q. Now, after we get across Willow Creek now are there any roads in existence at the present time to the west of that in the Leonard Canyon block?

A. There are some temporary spur roads that are constructed in the Leonard Canyon block.

There is one in particular that has been built from approximately the head, the west side of the Wiggins crossing cooperative project to a point in section 25. But generally the entire area is inaccessible for logging purposes except for roads, jeep roads that have been used for such administration and fire protection that has been able to be afforded there.

(Testimony of Yale Weinstein.)

Q. It may be clear, Mr. Weinstein. But I was just asked one question to clarify it if it isn't. In the Leonard Canyon block, which is to the west, what do the white sections represent?

A. The white sections represent the even numbered sections which are in the ownership of the United States Forest Service.

Q. Now, I notice you have on this map green broken lines. What do those represent?

A. The green broken lines are roads that are engineered and are requirements of the timber sales, one of which has [537] already been offered and bid and the other one is a proposal being offered. These are the main roads that are engineered and are a requirement and a part of the timber sales that the Forest Service has put up.

Q. By requirements do you mean that the purchaser at that sale has to build those roads or pay part of it, how is that handled?

A. The purchaser has to build those roads. These roads are main roads which are designed and specifications are submitted, they must be built according to the specifications and to the acceptance of the standards laid down by the United States Forest Service.

Q. Now, I notice you have written on here "Wiggins Unit." What does that represent, printed on there rather?

(Testimony of Yale Weinstein.)

A. The Wiggins Unit, I believe that I have shown the boundaries of that and I can trace them. It is shown on the boundaries as this blue line. The Wiggins Unit is the sale, the timber sale unit that was offered for sale by the United States Forest Service.

Q. When?

A. I don't recall the exact date.

Q. Approximately?

A. I believe that it was in April, sir, last month. It was offered last month, the exact date I do not recall.

Q. And that's the sale in the unit which there has been [538] evidence here that Nagel purchased at that sale, Nagel Lumber & Timber?

A. That is correct, sir.

Q. Now, are there any roads in existence at the present time over farther into the western edge or western side of the Leonard Canyon block?

A. Only insofar as the type of road that we might qualify as a jeep trail.

Q. Now, you have printed on here Limestone Unit to the western part, what does that mean?

A. The Limestone Unit is a Forest Service timber sale unit that is currently being offered for sale with bidding on May 31st, 1960, sir.

Q. That's the sale that I asked you to look at a notice and exhibit this morning that was introduced in evidence?

A. That is correct, sir.

(Testimony of Yale Weinstein.)

Q. And as a part of that sale will there be requirements for road construction too?

A. There are similar road requirements in this sale and the main roads required as terms and conditions of this sale are indicated by the green lines within the boundaries of the Limestone Unit.

The white sections again are the even numbered sections representing the ownership by the United States Forest Service, the yellow are the Duke City Aztec sections, [539] the blue and the yellow I believe substantially represent the remaining Aztec timber that is interspersed with United States Forest Service timber and after this sale is completed, and after this sale is completed the unique condition that will exist in those two units will no longer exist in the other units of Forest Service timber.

Q. And by "this unit" and "this unit," you pointed to the Wiggins Unit and the Limestone Unit?

A. And the Limestone Unit, excuse me.

Q. All right. Now, there are only two or three other matters here that you have not covered, Mr. Weinstein, and I will point these out simply because these names either have appeared in evidence or will.

I note you have Promontory Unit with red diagonal lines across it. What does that represent?

A. Mr. Moore, I have indicated the boundaries of the Promontory Unit. It is another national forest, U. S. Forest Service timber sale unit which

(Testimony of Yale Weinstein.)

was bid by the Gallagher companies in 1955. I have indicated by red cross hatch lines that portion which was logged over by the Gallagher companies prior to the acquisition by the Duke City Lumber Company.

The boundaries of the Promontory Unit are indicated by a blue line and the white or portion that is not cross hatched is that area that remained to be cut by the Duke City Lumber Company. [540]

Q. Thank you. Now, I notice you also have Alder Lake Unit. What does that indicate?

A. That is a unit that is directly east of the Promontory Unit. It is the unit that was bid by the Nagel Lumber & Timber Company and I believe the Alder Lake Unit is still in force, the contract for the Alder Lake Unit is still in force, that cutting had not been completed.

Q. Now, I notice you have colored — I guess that's red, isn't it? A. Yes, sir.

Q. The Duran Unit, what does that represent?

A. The Duran Unit, I have indicated the Duran Unit. There are two portions of the Duran Unit, Mr. Moore. The north Duran Unit and a south Duran Unit. The south Duran Unit I have indicated as a unit that was cut by the Duke City Lumber Company, and the north Duran Unit I have shown as Nagel Lumber & Timber Company.

Mr. Moore: Excuse me just a moment. Does the Court have any question at all about this exhibit?

The Court: No.

(Testimony of Yale Weinstein.)

Mr. Moore: We have one more and this won't be very long.

(Defendants' Exhibit F marked for identification.)

Q. (By Mr. Moore): Mr. Weinstein, I might ask you one or two other questions I think I overlooked here. [541]

Mr. Romley: I didn't hear you.

Mr. Moore: I said I thought I may have overlooked a question or two.

Mr. Romley: I'm sorry.

Q. (By Mr. Moore): On Defendants' Exhibit D with respect to—you showed us a moment ago two sections in the Coconino National Forest?

A. Yes, sir.

Q. That are owned by, I guess—

A. Southwest.

Q. Well, that they have conveyed over to make up a deficiency?

Mr. Romley: If there was a deficiency.

Mr. Moore: What?

Mr. Romley: Wasn't it to be done if there was a deficiency?

Mr. Moore: They have already conveyed it, and because there was, that's the reason they were colored over there.

Q. (By Mr. Moore): Has there been any timber cut out of those sections?

A. Yes, sir, that cutting is progressing at the present time.

(Testimony of Yale Weinstein.)

Q. And being milled where?

A. At Winslow.

Q. What is your availability of roads from that area to [542] Winslow without going into detail, just generally what is the area?

A. Well, that entire area is generally accessible. There is a road which is paved for about 27 miles from Winslow to the forest boundary of the Cococino and our reason for asking that particular area was its ready and direct accessibility and our thoughts were that this timber would be available to us at any time an emergency may present itself that we had to get into an area in a hurry.

Q. Now, let me direct your attention, Mr. Weinstein, to Defendants' Exhibit Number F, and just simply tell us what these various designations mean on that exhibit. Of course you circled Phoenix, that we can read.

But the designation here, "Whiting," what does that mean?

A. That indicates the location of a mill owned by the Whiting group located at Payson, Arizona. I have indicated in parenthesis Owens, it is formerly owned by the Owen brothers.

Q. And at Flagstaff you have an indication there?

A. I have an indication of Southwest Lumber Mills, the map I realize is incomplete in that there is an additional mill owned by the Whittings also in Flagstaff.

(Testimony of Yale Weinstein.)

Q. Is that the Kaibab Lumber Company?

A. I'm not completely familiar, but it is the Whiting group, sir. [543]

Q. And over at Winslow you have two?

A. At Winslow I have indicated two, Duke City Lumber Company and the Nagel Lumber & Timber Company.

Q. And what is this, you have something at Holbrook?

A. At Holbrook I have indicated a planing mill, dry kiln and concentration yard, shipping facilities for the Whitings at Holbrook.

Q. And you have one marked L. D. Porter, what is this?

A. L. D. Porter is a saw mill, Donny Porter, as we refer to him, has a saw mill at Heber and as he is the gentleman who logged a portion of the Chevalon working circle from the Alder Unit following the fire.

Q. That's this area?

A. That is not the Alder Lake Unit, no, sir.

Q. Well, can you point out where that Alder Unit was?

A. I cannot define the exact location, but it is in the general area in the northeast quadrant of the Chevalon working circle. That is the portion which was logged to Mr. Porter's mill at Heber.

Q. Now, below Porter you have—what's that, Overguard?

(Testimony of Yale Weinstein.)

A. That is Overguard, I have indicated the location of a saw mill at Overguard, that which was formerly operated by Southwest Lumber Mills, the mill has been temporarily abandoned. It most recently was operated by the Whiting group to liquidate some of the Aztec stumpage which they had [544] purchased in that area.

Q. And then — you have something, Southwest Lumber Mill, McNary?

A. At McNary, that is the large mill at McNary.

Q. And these indications on this exhibit, Defendants' Exhibit F, does that indicate the location of existing saw mills and planing mills that you have described?

A. It indicates the location—those that I have described, Mr. Moore. There are additional mills in the area which I am not completely familiar with.

There are two saw mills, I believe, in the Snowflake-Show Low area, the ownership on those has changed and I was not completely familiar with them.

Q. And are there any others that exist in that area that are not shown on this exhibit?

A. I believe that this indicates all of those that exist in the area except for these two additional mills that exist in the Snowflake-Show Low area.

Q. Mr. Weinstein, after the cut is completed in the Wiggins Unit, the sale that you mentioned a moment ago that was made recently, and after the

(Testimony of Yale Weinstein.)

cut of the Limestone Unit then where on the map will there be available timber for future Forest Service sales?

A. Well, Mr. Moore, I can only answer that insofar as describing the general areas that are available. The exact [545] location will be determined by the Forest Service as dictated by the demands of the management plan. But in general there is an area south of the Limestone Unit and the Wiggins Unit which is a general virgin area in which no cutting has yet taken place within the Chevalon working circle.

There is an area south of the Duran Unit in which no cutting has taken place.

Q. Now, you have indicated the Duran Unit?

A. The south Duran.

Q. Which is D. C. L. Company?

A. Yes, the south Duran Unit. I have not—I have not indicated the entire cutover area within the Chevalon working circle, but those are the generally main areas.

Q. And that's the southern and southwestern part of the circle is where the main areas will be after these cuts that we mentioned?

A. Yes, sir.

Q. I assume that there is some timber in other parts, but you have not indicated which part has been cut over?

A. There are, but I have not indicated which portions have been cut over.

(Testimony of Yale Weinstein.)

Q. Is any of the Coconino National Forest available in any sales for any other operators other than those that now are established in Flagstaff?

Mr. Romley: Just a moment, I object to that as the [546] proper foundation has not been laid. We are not here concerned with Coconino National Forest.

Mr. Moore: I want to show that it's not available, your Honor.

Mr. Romley: We have never contended any Coconino National Forest timber is available for these two mills.

Mr. Moore: May it be stipulated there will never at any time be any Coconino National Forest available for owners in Winslow?

Mr. Romley: I will not so stipulate, but I will say we never contended it is not available. This witness is not qualified to answer.

Mr. Moore: He is under the sustained yield agreement which we can operate on that, but if you can agree with that and save time——

The Court: Well, in the light of counsel's statement that they make no contention it's available I don't see the materiality of it.

Mr. Moore: Thank you, your Honor.

The Court: Have you offered F, Mr. Moore?

Mr. Moore: I believe that it was.

Mr. Romley: I don't think you did, but I have no objection to it.

(Testimony of Yale Weinstein.)

The Court: It may be received.

(Defendants' Exhibit F received in [547] evidence.)

Mr. Moore: Thank you, your Honor. I had shown that to Mr. Romley.

Mr. Romley: Yes, I had seen it during the recess, your Honor.

Q. (By Mr. Moore): Mr. Weinstein, I wish you would explain briefly the manner in which the Forest Service scales trees or logs in these units that have been sold or are being offered for sale?

A. For the past eight or ten years the Forest Service has sold timber on a system which is referred to as a tree measurement system, or a marble system.

Q. Explain how that works?

A. Yes, sir. The general mechanics of the determination of volume is based upon the following: Instead of measuring the volume of a tree as a function of its diameter and the height which is usually represented in terms of the number of 16 foot logs, which is a standard within the trade, that may be obtained from a particular tree, instead of measuring the volume or determining the volume of each tree the Forest Service had devised a system whereby a purely random sample or a measurement of one tree in ten was taken and the procedure was as follows: The timber Forest Officer who is charged with the responsibility of marking the timber, on the basis of the guide and the

(Testimony of Yale Weinstein.)

rules laid down insofar as the marking rules pertaining to that particular stand of timber, [548] made his determination as to whether a particular tree in the stand was to be marked for cutting. All timber to be cut was marked by a representative of the United States Forest Service. He first made his determination as to whether or not that tree was to be cut and it was so marked by appropriate mark either a paint mark or using an ax to blaze the stump and a position at breast height and put an appropriate U. S. brand on it.

Then to determine whether or not that tree was to be measured he normally carried ten marbles, nine of which were white and one of which was black, and on a purely random basis he reached into his pocket and he pulled out a marble. If it was a white marble he did not measure that particular tree and he proceeded throughout the stand making his determinations as to whether or not a tree should be marked under the terms of the management plan and the prevailing marketing rules.

As he came to each tree he reached in and pulled out his marble, and if he then pulled out the black marble this was a marble tree, it indicated that this was the tree that was to be used as a basis for measurement for that particular group of ten.

Q. That's the one that got blackballed?

A. Yes, sir. That tree was measured, the diameter of that tree was measured and an estimate was made as to the number of 16 foot logs or the total height that may be his [549] estimate in that

(Testimony of Yale Weinstein.)

particular tree. This procedure was repeated and this gave him the gross volume determination for the trees that he had marked that day.

The marble trees, or those trees that were indicated for measurement by the removal of the black marble, were numbered on the tree on the bark blaze and the corresponding number was recorded in a book. So in essence what they had done was to measure every tenth tree within the stand.

Q. And was it upon that basis that they determined the gross log scale?

A. It was upon that basis that they determined the gross log scale.

Q. And where they, after the tree was cut, after the sale and after the tree was cut, were the logs rescaled or remeasured in any manner by the Forest Service?

A. Not all of the logs, Mr. Moore. On the basis of what they regard as a statistically sound sample, they then took a representative sample plot and they, at this point they have a gross volume determination and what they were seeking was a net volume to be deducted from that, the amount of defect or hidden defect that was present in the log.

So for these designated defect plots the trees were cut and bucked into the appropriate log lengths, the Forest Officer in charge then measured or scaled these logs to determine the amount of defect which is usually expressed in [550] the terms of percentage, and on the basis of the percentage

(Testimony of Yale Weinstein.)

that was determined from his defect scale this was applied to his original gross volume determination to arrive at what was the net volume determination, the basis upon which we then paid for stumpage to the United States Government.

Q. Now, you mentioned some changes or prospective change in the scaling method, what is that?

Mr. Romley: We object to that, if your Honor, please, no proper foundation has been laid. It's based on hearsay.

Q. (By Mr. Moore): Has there been a change? I think the witness has seen it work.

Has there been a change in the method of scaling by the Forest Service from the marble method?

A. We have been requested to change from the marble system to a log scaling system which, in comparison, is a log——

Mr. Romley: Just a moment, just a moment, if your Honor please we are getting into hearsay and it's not responsive to the question.

The Court: Well, who has made the request, Mr. Weinstein?

The Witness: The United States Forest Service.

The Court: He may answer.

A. The representatives of timber management in the Sitgreaves National Forest have made the request and have [551] advised us that subsequent sales will no longer permit the use of the marble system as a means of volume determination and have requested that we make an immediate change to log scale.

(Testimony of Yale Weinstein.)

Q. And what do you mean by log scale?

A. Log scale will be a volume determination that, rather than to determine the volume of a representative sample of the stumpage which is sold to the purchaser, they will then make an exact or as precise as they can determination of the volume of each log that the purchaser fells, bucks and skids.

And it is—fells, bucks and skids, and it is at this point following the felling, bucking and skidding procedure, at that point or some later point they will make an exact determination of the true net volume of each particular log.

Q. And from that the stumpage is computed?

A. From that the volume of the stumpage is computed and the purchaser is billed according to that determination.

Q. You used three terms, felling, bucking and skidding. Is felling the sawing down of the tree?

A. That is severing the tree, falling the tree, yes.

Q. And bucking is what?

A. Bucking is cutting it into proper lengths as dictated by the needs of the industry.

Q. And skidding is what?

A. Skidding is the process of moving the tree from the [552] site at the stump to a convenient point for loading, usually alongside of a main or spur road that has been constructed.

Q. Mr. Weinstein, I believe you were in courtroom the other day when Mr. Kirkpatrick said something about a fire, forest fire in '56 or '57?

(Testimony of Yale Weinstein.)

A. Yes, sir.

Q. Generally where was that—I don't know whether I asked you, where was that fire located?

A. That fire, as Mr. Kirkpatrick referred to it, was the Dudley Lake fire and this particular area shown in section 10 shown here as Dudley Lake was presumably the point where the fire started and the fire was referred to as the Dudley Lake fire. It started at this point and proceeded in a generally northeasterly direction.

Q. Is forest fires a serious hazard in the lumber business?

A. An extremely serious hazard.

Q. Were you present or helping or fighting fire or checking it or anything and have personal knowledge with reference to the Dudley Lake fire?

A. I was, sir, I was in Winslow the day the fire started and my first knowledge of the fire was smoke which I was able to see from Winslow, some 40 or 50 miles away. I spent, I believe, the next week, ten days or two weeks on the fire, yes, [553] sir.

Q. Does the wind have any serious effect with respect to forest fires?

A. Well, in a general manner it has a very, very serious effect. I mean not only in directing the course of the fire, but supplying the necessary, the additional oxygen that supports combustion and all; in this particular fire it was a very serious matter in that it—

(Testimony of Yale Weinstein.)

Q. Which way was the wind blowing on that fire, which way did it carry it?

A. The wind carried it generally from this point at Dudley lake in this direction.

Q. What was the type of timber that was burned?

A. Well, this particular area through here represents—this area had been partially logged, there was a residual stand in the path of the fire. The general boundaries of the fire, it jumped across this road many times, I know I was present at a portion of the fire when it crossed this road which we refer to as the Hundred Road, it's a road that's approximately, oh, it must be 24 feet wide, a well graveled open road. But with the winds that were existing, the prior low periods of prolonged humidity, the conditions were such that in spite of the very best efforts of all the men and machinery available they were unable to stop it. It burned up to within, I guess, 50 feet of one of the houses here in the Chevalon Ranger Station camp and it ultimately burned [554] itself out of the timber and portion of the fire was really never controlled. It ran out of fuel and burned itself out into the desert type on the fringe of the Sitgreaves, it ran out into the pinion juniper type.

The main efforts, of course, were devoted toward trying to protect the administrative site there and also to try to head it off on the flanks.

(Testimony of Yale Weinstein.)

Q. I assume, Mr. Weinstein, in your training that you have told us about in the school, University of Minnesota as well as your experience you were trained and have had some experience with reference to the details and prevention and hazard of insects and diseases in forests?

A. Yes, sir.

Q. Insects first, is that a hazard to a forest?

A. Oh, it very definitely is a hazard. I have been a member of the Forest Insect and Disease Committee which is a committee composed of private industry and various representatives of the public and private agencies to work with the various managements and the research groups, and by reason of my association with the Forest Insect and Disease Committee, I have been quite impressed with the real problem that we have had in controlling the damage.

Q. I don't know how to ask the question. Insects first. Is there a mortality rate in trees as a result of infestation of insects, or just describe very briefly for me how that is [555] hazardous?

A. Well, if I may borrow a phrase that Mr. Kirkpatrick used the other day when I was present in court, we always have an endemic population of insects in our forest. When certain conditions prevail, such as prolonged periods of drought which we have encountered, the epidemic or other weather conditions may be particularly favorable to bring out a good hatch of insects.

(Testimony of Yale Weinstein.)

But with certain conditions prevailing the endemic populations which are ever present may become of epidemic proportions.

Q. And when they become of epidemic proportions, what is the effect upon the forest?

A. The effect is that more direct mortality can result as a result of insects attacks.

Q. By direct mortality you mean that they actually kill trees?

A. They actually kill trees, some of the most serious are those of the beetle families, which operate directly underneath the bark of the trees and during the course of their operation they will more or less girdle the tree, they kill that very, very small, only living portion of the tree, the cambium layer, and as a result the tree will die if it is ultimately girdled. [556]

Q. Have you had any problems in any of the national forests you worked in in New Mexico or Arizona with respect to insect damage?

A. We have had some rather serious outbreaks of the spruce bud worm in New Mexico, which resulted in extensive defoliation in contrast with the beetle damage, in contrast with beetle damage which kills the trees by girdling it. We have various types of defoliating insects which has resulted in rather serious epidemics of spruce bud worm. We have had defoliation attacks in aspen, which up to now has not been regarded as a particularly commercial tree, but in all probability has signs

(Testimony of Yale Weinstein.)

of achieving commercial importance. We have had serious attacks of the fir and graver beetle within both the Douglas fir and white fir.

Q. Was that limited to New Mexico, or some of it in Arizona?

A. There has been some of it in Arizona. I have been more familiar with some of our problems in New Mexico inasmuch as the control measures that I am familiar with have been effected there. I believe in one of our recent forest insect and disease committee meetings there was indicated a loss of about 600,000,000 board feet in 1957, I believe, from insect attack.

Q. What about fungus growth, is that also a problem?

A. Well, this is a problem in forest tree disease. This [557] defect factor that I refer to is in most cases the result of western red rot or various other types of fungus or tree disease. Western red rot, I believe, is the most serious that affects our timber. It is ever present and always present in our virgin mature stands.

Q. Are there any other matters that I have not specifically mentioned that constitute hazards in the forest with respect to the production of lumber?

A. Oh, yes, I do believe that the mere factor of weather is one of our very serious problems insofar as the production of lumber was concerned. Is that your question, Mr. Moore?

Q. I will get to that in just a moment. But with respect to damaging the forest—

(Testimony of Yale Weinstein.)

A. Weather does have an effect, because we have had instances where very severe winds, particularly following logging where the stands are opened up and the very severe spring winds following the spring thaw when the ground is quite wet has resulted in a considerable amount of wind fall. I specifically recall that according to the terms of our management sales contracts we are required to go in and clean up some of this wind fall and at various times we have been called upon to make such salvage cuttings of that portions of the residual stand which was blown over by heavy winds, usually following the spring thaws.

Q. Particularly in northern Arizona what effect does [558] weather have upon the production, of getting logs out, or production of lumber?

A. I think that question, Mr. Moore, could best be exemplified by the predicament that we found ourselves in this past logging season. Our mill, and I believe most mills similar to ours have more or less traditionally operated on the basis of more or less keeping our logging geared pretty close to our production during the normal summer months. This is another factor, but the logs in which we are dealing could almost be regarded as a somewhat perishable commodity in that we can't build up big inventories during certain parts of the year. If I may start on that subject, one big problem is blue stain, which is a wood staining organism. It does

(Testimony of Yale Weinstein.)

not materially affect the strength of the sawn product, but it does have an effect upon the degrade of the stains, it makes it a blue color, as the name indicates. Because of this limiting factor, we are more or less obliged to keep our production, our log production pretty much in line with our sawmill production without building up the inventories. And normally what we do is sometime in late, in early fall, about September, the formation of blue stain damage in logs is either affected by moisture or heat and if you can remove our oxygen, which must be present and if you could remove any one of these factors you could control the blue staining of logs. In about the middle of September [559] or late September, early October, it is usually cold enough so that the bluing season is past, as it is generally referred to. This past year I recall the date of October 16th was our first very heavy rain accompanied by snow. I believe our records indicate there was equivalent of about six inches of precipitation in our general logging area. And in spite of what we thought were our very best efforts to build up an inventory that would enable us to not only continue the sawmill situated in Winslow, but also build up an inventory in addition to our current needs, which would carry us through the bad winter months, in spite of our best efforts because of precipitation and moisture we were unable to do so, and as a result of this effect of the weather upon our logging we sawed our last log in Winslow on

(Testimony of Yale Weinstein.)

January 29th and we were not able to resume our operation of the Winslow plant until about April. We lost two full months of production.

Mr. Moore: On this phase of the case, your Honor, that is all I have at this time of Mr. Weinstein. I will recall him later on other matters, but I wanted to get this part of the background material out. If Mr. Romley has any questions, or prefer to wait until I recall him. I will recall him some time, or wait until after lunch.

Mr. Romley: I think perhaps I can examine him very briefly and not waste the ten minutes before the noon hour. [560]

Cross Examination

Q. (By Mr. Romley): Mr. Weinstein, these hazards of fire, insects, fungus and weather, I believe those are the only ones you mentioned insofar as lumber production is concerned, is that right?

A. I believe that is right, Mr. Romley.

Q. They have always to some extent been present in the lumber industry, haven't they?

A. I believe that they have, Mr. Romley, if I may qualify this further.

Q. Let's take fire, for example, any improvements been made by the U.S. Forest Service or others in providing safeguards against fire and in better controlling fires when they do occur?

A. I believe you would have to answer that question that they are constantly trying to improve their fire system. However, in this particular in-

(Testimony of Yale Weinstein.)

stance, I believe that the Sitgreaves Forest has been in existence for some sixty years and even under the early terms of administration when it received very little protection, in contrast with the type surveillance and protection they have now, they have never experienced a fire of the intensity of this Dudley Lake fire.

Q. Once in sixty years?

Mr. Moore: That is not what he said. We object. [561] He said of this intensity in sixty years.

A. They have had many fires but there is an offsetting factor here, Mr. Romley, I believe in that the opening up of the forest enables more people to use the forest. I think all of the statistics bear out the fact that the greater usage the more fires we have. Logging itself brings additional hazard by reason of the slash accumulations that result.

Q. I ask you if it isn't a fact that improvements have been made in safeguarding against fires and in controlling fires once they occur, and you say efforts constantly are being made to do that?

A. Yes, sir.

Q. And efforts have been successful in large measure, have they not? It is more than just trying to do so, they have been successful in a large measure?

A. There have been improvements and they have met with success.

Q. With reference to safeguards, protection against insects and fungus, the same likewise is

(Testimony of Yale Weinstein.)

true, there are continuing efforts to minimize the amount of damage caused by insects and fungus, is that right?

A. That is right, Mr. Romley.

Q. The continuous educational and scientific program that is lessening from year to year the damage that is caused by these two hazards you mentioned, isn't that right, sir? [562]

A. I don't believe the damage has been reduced, Mr. Romley, but I do believe that you are quite right in that their efforts continue toward the control and trying to reduce the damage.

Q. Do you mean by that that the efforts have been unsuccessful?

A. In many instances they have.

Q. And in most instances however have the efforts been successful?

A. I don't believe I could qualify the success or non-success to that degree.

Q. You can say so and I assume you do say that improvement in that respect, control of damage caused by insects and fungus has been made during the past several years? A. Yes, sir.

Q. And the studies being carried on, the work being carried on can reasonably be expected in your opinion to continue to show improvement as the years go by, is that right, sir?

A. Mr. Romley, the research has been directed, really the big problem is getting sufficient funds to carry out what they think might be--this I believe is the great limiting factor.

(Testimony of Yale Weinstein.)

Q. The problems that, insofar as insect and fungus damage, are no greater than they were ten years ago, are they? [563]

A. In many instances I believe that some of the insect problems are perhaps greater. It may be that they are watching them closer and perhaps better recognizing as a result of their research what is taking place.

Q. The element of weather which you also designated as a hazard is something that is always with us and we cannot control that?

A. Yes, sir.

Q. And it is something the lumber industry has had to live with from the beginning, is that right, sir?

A. Weather has always been a problem, sometimes becomes more serious than others.

Q. You don't anticipate in connection with the production of lumber from the Chevalon working circle that the weather there is going to be any more of a problem in the next fifteen years than it has been in the last fifteen years, do you?

A. I don't think the weather, Mr. Romley, by this condition——

Q. If you can confine yourself to answering my question. I am not talking about anything but weather now. Would you answer that?

A. Would you restate the question, please?

(The last question was read.) [564]

A. I would have to answer that question yes, that the weather will have more of an effect in the

(Testimony of Yale Weinstein.)

next fifteen years than it did in the past fifteen years.

Q. Do you think you are qualified, trained and experienced in any way to make that statement?

A. Yes, sir.

Q. Have you had weather problems during the time—I believe you returned to work or having any duties with the Chevalon working circle in about 1952, was that right?

A. Was your question have I had any training—

Q. Perhaps it isn't a good question. I will concede it, sir. You have had contact and connection with production of timber in the Chevalon working circle for some time? A. Yes, sir.

Q. When was the first time? Or perhaps it might be easier for you to answer and tell us for how many years in the past, approximately, sir.

Q. Well, 1946 we were engaged in production in the Chevalon working circle and the period 1952 to date.

Q. 1946 for one year only? A. Yes, sir.

Q. You got about eight or nine years?

A. Yes, sir.

Q. During those eight or nine years weather has been a problem, has it not? [565]

A. Yes, it has.

Q. You have had periods when production has shut down during the past eight or nine years during the winter months because of snow and rain and things of that sort?

(Testimony of Yale Weinstein.)

A. Production has shut us down, our logging. This is the first time the mill has completely run out. This is an ever-present problem with us however.

Q. You have had to curtail production at least during the past eight or nine years during at least some of the winter months?

A. Oh, yes, sir.

Q. Generally in December, January, February, isn't that right, sir?

A. That is quite right.

Q. And during those months at least, generally, you do no felling or skidding, do you?

A. As the conditions prevail in some years we operate throughout the entire winter, as we did the previous year.

Q. You have told us about the mills that are shown on one or more of these exhibits?

A. Yes.

Q. I failed to make a note of those you called out. Can you tell me what those are, sir?

The Court: They are on the map.

Q. (By Mr. Romley): Can you tell me the number of mills, [566] weren't there several that you mentioned?

A. There were several, yes, sir.

Mr. Romley: Okay.

The Court: We will take the noon recess at this time.

(Noon recess.) [567]

(Testimony of Yale Weinstein.)

May 6, 1956, 1:30 O'Clock P.M.

YALE WEINSTEIN

resumes the witness stand, and testifies further as follows:

Cross Examination—(Continued)

Q. (By Mr. Romley): Mr. Weinstein, just before the recess I was asking you about the number of mills that you referred to Exhibit F, I believe it is. Approximately how many were there, without reference to the exhibit, six or eight, thereabouts?

A. About that, yes, sir.

Q. In all the years of your experience with the Chevalon working circle, have any of the owners of any of those mills bid for Forest Service timber in the Chevalon working circle?

Mr. Moore: We object, your Honor, it is immaterial. It does not prove they will not in the future as timber depreciates in volume.

The Court: He may answer.

A. Mr. Romley, did I understand your question that in my knowledge in the history of the Chevalon working circle had any of those mill owners bid on Forest Service timber within the Chevalon working circle?

Q. (By Mr. Moore): Other than Duke City or other than, [568] the present Duke City, the Gallagher mill and Nagel mill.

(Testimony of Yale Weinstein.)

A. To my knowledge, Mr. Romley, only the case of the one instance when Mr. L. D. Porter bid on the Alder unit, cut and hauled that timber to a mill, I believe.

Q. That was limited to the cutting and hauling of the timber damaged in the fire, is that right?

A. It was a portion of the timber that was damaged in the fire, yes, sir.

Q. But he hauled only fire damaged timber?

A. That is all that was included within that timber sale, yes, sir.

Q. The Forest Service was anxious to get that out of there as fast as they could?

A. Yes, sir.

Q. That is the only one you know of in all those years?

A. I believe that is the only one that I do recall.

Q. And these mills, have they all been in existence for many years? A. Which mills—

Q. The ones you listed or showed on Exhibit F?

A. Well, at least for the last five years or longer.

Q. Any of them as short a period back as five years?

A. I really don't know when the present Whiting mill or formerly Owens mill at Payson was constructed.

Q. As to the rest of them, have they been there fifteen [569] or twenty years?

A. Some of them have, yes, sir.

(Testimony of Yale Weinstein.)

Q. Any of them less than fifteen years, other than maybe the Whiting one at Payson about which you do not know?

A. The Whiting operation that I referred to of the plant at Holbrook, I believe it has been in existence less than fifteen years.

Q. That is not a sawmill, that is just a planing mill?

A. That is not a sawmill.

Q. How many mills are you connected with in your position with Duke City, oversee in any way or have any dealings with that belong to or operated by Duke City or companies in which Mr. Liberman is one of the major owners?

A. Are you referring to sawmills, Mr. Romley?

Q. Yes, sir.

A. The sawmill at Winslow? Did you wish me to enumerate them?

Q. Tell me how many there are, sir, that is sufficient for my question.

A. At least six.

Q. And what was your position again in that work, are you the production manager, did you say? I am not sure I got that.

A. I refer to it as such in trying to find a specific title in answer to the question [570], Mr. Romley.

Q. I think you said you are assistant to Mr. Liberman in these enterprises?

A. I assist Mr. Liberman.

Q. And has that same situation as to the number of mills and your position with regard thereto pre-

(Testimony of Yale Weinstein.)

vailed since you went with Mr. Liberman and his companies? A. In varying degrees.

Q. Do you know what proportion of the total production of these Liberman companies, if we may term them that, is produced by the Duke City mill in Winslow, percentage-wise, approximately?

A. Approximately somewhere about one-third.

Q. About one-third. Your production there in the thirteen months period ending December 31, 1959, was about twenty-nine million-odd feet, was it not?

A. I don't have that figure at my fingertips. A thirteen-month period?

Q. Yes, for the period ending December 31, 1959. Is that approximately correct, sir?

A. I would say it is approximately correct.

Q. What compensation do you receive in this work in which you are engaged?

Mr. Moore: I don't know that that is material, if your Honor please. I object to it upon the grounds that I see no materiality or relevancy to any issue here. [571]

The Court: He may answer. It might go to interest if nothing else.

A. What compensation?

Q. (By Mr. Romley): Yes.

A. I am paid \$2,000 a month.

Q. That is \$24,000 a year? A. Yes, sir.

Q. Now, until you went with Mr. Liberman, I think you said in December, 1958, you had been an employee of the Arizona Timber Company which

(Testimony of Yale Weinstein.)

was controlled by the New Mexico Timber Company and in turn owned by A. I. Kaplan and Tom Gallagher, is that substantially correct?

A. Yes, sir.

Q. The reason for the sale of the Gallagher properties there at Winslow, one of the prime reasons was the state of Mr. Kaplan's health, was it not? A. I did not say that, Mr. Romley.

Q. I am asking you, sir.

A. This was a question?

Q. Yes, sir.

A. Frankly I really don't know the exact reason for that.

Q. Do you know what Mr. A. I. Kaplan's state of health was during that period when the negotiations were under way for the sale which finally was consummated on November 6th, 1958? [572]

A. Mr. Kaplan was quite an elderly gentleman and had sustained a hip injury as the result of a fall and I believe I have not seen Mr. Kaplan for probably four years, maybe three years.

Q. Was he not in poor health at that time?

A. I believe he was.

Q. And passed away shortly after?

A. Yes, sir.

Q. You are fairly well acquainted with the policies, at least some of them, of the United States Forest Service, are you not, in relation to the manner in which the timber is put up for sale, are you not?

(Testimony of Yale Weinstein.)

A. Yes, sir. Part of my duties and responsibilities require that I try to keep abreast of their policies.

Q. And you know that it is and has been the fixed policy of the Forest Service in selling Forest Service timber, including that in the Chevalon working circle, at such prices as to afford the efficient operators to make a fair profit, is that right, sir?

A. According to their policy in the manual and rules that govern their appraisals, they attempt to do that, and many times we have taken substantially violent differences of opinion as to whether or not their appraisals do afford this margin of profit which they claim is there. We have not always agreed with them that they have taken that into [573] consideration.

Q. You know that has been the fixed policy before, sir?

A. This has been their policy, yes, sir.

Q. Now, is there generally in the lumber industry a term referred to as "sawn logs"?

A. There may be such a term, Mr. Romley, it is not one I generally use myself nor one that I normally use.

Q. Do you and have you always understood that term to mean when you have seen it used that it represented the logs that were, insofar as scaling is concerned, the logs sawed there at the mill?

(Testimony of Yale Weinstein.)

A. Frankly, Mr. Romley, I had not seen that particular term until just the other day when I read that "logs sawn" term.

Q. There is a difference, is there not, between the net log scale as fixed, determined by the United States Forest Service for timber in the forest as compared to the timber that is at the mill just prior to its being sawed?

A. Mr. Romley, I am sorry, I don't understand that question.

Q. I will withdraw the question. That is all, sir. I have further questions, but I am going to defer them because counsel has said he is going to call him on other matters. I won't go into them now.

Mr. Moore: Just one question, [574] Mr. Weinstein.

Redirect Examination

Q. (By Mr. Moore): Mr. Romley asked you a question or two this morning about weather problems and in substance whether weather problems would be the same in the future as they had been in the past with reference to the remaining timber you have up there. Will you explain what you meant when you said the weather problem would be greater you thought in the future?

Mr. Romley: Just a moment—well, go ahead.

A. Mr. Moore, what I meant by that, and I didn't mean to appear that I would be a weather prophet, but assuming weather conditions in the future are equally as good or as bad as they have

(Testimony of Yale Weinstein.)

been in the past, what I meant by that is the effect upon logging would be essentially this: Normally in our logging operations we have attempted to keep comparatively readily accessible timber available for periods of bad weather, snow, rain and other things. For example, this area directly adjacent to the main road at the Chevalon Ranger Station, we have retained as more or less a nest egg for bad weather, and that logging was not done until this past year. We have tried to set up our logging operations in a manner whereby we would always have such a nest egg available to us. There are considerable differences in the weather pattern, snowfall pattern between this area, timbered area, and this area on the north end of the fringe, this being [575] more readily accessible and available and not affected by weather as much. The unfortunate position we find ourselves in now is that we no longer have such nest eggs available to us and the weather will have an effect in the future that it did not have in the past.

Q. Is there a difference in elevation involved?

A. Well, there is a difference in elevation between, for instance, I can readily see at the Promontory Butte we have an elevation of 7,933—if I can find one other bench mark—here is a bench mark, an elevation of 6,000. Between these two points there is a difference in elevation of between 6600 and 79, over 1300 feet, which does on the ground substantially give us a different climate weather pattern between those two points.

(Testimony of Yale Weinstein.)

Mr. Moore: That is all, Mr. Weinstein.

Recross Examination

Q. (By Mr. Romley): What is the elevation at the Chevalon Ranger Station?

A. I don't know what the exact elevation is. I am looking for a bench mark that is close by, Mr. Romley. This point of 6600 is about three and a half miles from the Chevalon Ranger Station.

Q. Is there one to the south of the Chevalon Ranger Station close by? [576]

A. Yes, sir, here is one, 7,185.

Q. That is about a mile and a half?

A. A little over a mile.

Q. Incidentally, how many thousands of acres are there in the Chevalon working circle?

A. Offhand I do not know.

Q. Several hundred thousand?

A. I wouldn't venture a guess.

Q. Are there several hundred millions of board feet timber in the Chevalon working circle, at least that much?

A. I am sure there are.

Mr. Romley: That is all.

Mr. Moore: That is all. [577]

JOHN STILB

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Romley): Will you state your name, please?

A. John Stilb, S-t-i-l-b.

(Testimony of John Stilb.)

Q. Where do you live, Mr. Stilb?

A. I live on Bear Canyon Ranch in Tucson.

Q. What is your profession, sir?

A. I am a life underwriter.

Q. And how long have you been?

A. I have been a life underwriter since 1945.

Q. Are you associated with any professional societies?

A. Yes, the Southern Arizona Association of Life Underwriters, Southern Arizona State Planning Council and the General Agents and Managers Association.

Q. Have you held any offices or positions in any of these organizations?

A. Yes, I am past president of the Southern Arizona State Planning Council and past president of the Southern Arizona Association of Life Underwriters.

Q. What experience have you had in the insurance profession? [578]

A. Well, I have been in the business since 1945, first as a special agent and then in 1953 I became an associate general agent. As of December, 1958, I became a general agent and I have my own firm of insurance counselors now.

Q. And what is the name of that firm?

A. John R. Stilb and Associates, Life Underwriters.

Q. And you maintain an office here in Tucson?

A. Yes, we do.

(Testimony of John Stilb.)

Q. In your work, Mr. Stilb, have you had occasion to make studies and acquaint yourself with any investments of funds and to ascertain their rates that can be realized from investments?

A. Well, yes, very frankly in the life insurance business you are competing for the investor's dollar and you have to keep yourself abreast of what other investments have to offer, their present performance and their past performance.

Q. Based on your experience, sir, do you have an opinion as to the highest interest rate obtainable on a reasonably safe investment made by persons of ordinary care and prudence in the community?

A. Well, we'd advise a client——

Q. First yes or no if you have such an opinion.

A. Yes.

Mr. Moore: In which community are you talking about? You said in the community. [579]

Mr. Romley: Well, I don't know that it varies from place to place, I perhaps limited it too much.

Q. (By Mr. Romley): Do you have such an opinion with regard to investments in the State of Arizona? A. Yes, I do.

Q. In your opinion, sir, what is the highest interest rate obtainable on reasonably safe investments?

A. I would say three and a half percent.

Mr. Romley: You may cross examine.

(Testimony of John Stilb.)

Cross Examination

Q. (By Mr. Moore): You mean as of today, that's the highest interest rate obtainable on safe investments?

A. No, I don't mean that. I mean that over a period of time we would advise a client who is concerned with keeping their capital secure that they could get a reasonable rate of return of about three and a half percent over a number of years. This is without jeopardizing their capital and where they are relying upon this income.

Q. U. S. Government bonds carry a higher rate than that, don't they, some of them?

A. Well, that's true, over the past twenty years they have gone from two and a half percent up to now three and three-quarters percent. [580]

Q. And do you know of any real estate first mortgage loans that you could get money at three and a half percent now?

A. No, during the depression they were at two and a half, three and three and a half, but now of course it's six, six and a half percent. But I was talking in terms of a long period of time, of course, fifteen or twenty years.

Q. Oh, you were going clear back to, you said depression. You don't mean back to the depression of the thirties, do you?

A. Right, right.

(Testimony of John Stilb.)

Q. Is that the basis of your opinion as to the highest rate obtainable — out of fairness I don't mean that alone, the depression period as one of the elements you consider in determining the highest rate obtainable now?

A. Well, naturally when we consider a high, a boom economy we also consider a low which our insured or our clients might find themselves living through that period.

As far as our present economy is concerned I point to investments such as a corporate trustee where they would be paying between three and four percent for Government bonds which have been between two and a half and three and three-quarters, or your commercial savings banks, 1946 they were one percent, now they are three percent; or your savings and loan companies which have gone between two and four percent. [581]

I generally point out that our life insurance companies, which is a group of trained investors but have to abide by the prudent man rule, have had a low in 1947 of 2.8 percent and in 1958 I'm speaking about the average, in major life insurance companies, it was 3.8.

Q. But to get money on good, sound first mortgages on real estate rates today you have to pay 6 percent or more?

A. That's correct.

Q. Is that correct?

A. Right today, that is correct.

(Testimony of John Stilb.)

Q. Right today. Do you know whether or not the large life insurance companies have recently determined to stop loaning money on home construction residences in Arizona?

A. As to whether they have stopped?

Q. Or are planning to stop?

A. Well, there has certainly been a lot of talk about it in our trade journals and so on and so forth.

Q. There was a meeting in Phoenix recently where some representatives of large life insurance companies appeared before mortgage loan officials and, I believe, reported that the large life insurance companies were stopping loaning money on private residence construction. Do you know whether that is true or the plan of life insurance companies?

A. Well, it was my impression that perhaps this is more of a temporary thing, I don't know whether it's true or whether [582] it's a conclusion at this time. However, I do know that for example, in our own portfolio, that 56 percent of our portfolio is in mortgages.

Q. Is that mortgages——

A. Commercial and residential.

Q. Commercial and residential?

A. And residential.

Q. What percentage of that is commercial?

A. I don't know offhand what percentage would be commercial.

(Testimony of John Stilb.)

Q. Do you have any recollection as to whether the commercial would be more than 50 percent?

A. It wouldn't be that high, I would think that it would be higher on residential. Of course this is pretty much a philosophy of companies.

There are some companies who have a higher percentage of their portfolio mortgages in residential than commercial and I was speaking in terms, of course, of the life insurance company averages.

Q. This three and a half percent that you estimated or stated, Mr. Stilb, is based upon the past and not forecasting for the future, is that correct?

A. Well, yes, we like to think that we are forecasting for the future. We think that—

Q. No, I meant your answer. Is that based upon your past [583] experience and not upon what you anticipate will happen in the next three, four or five years?

A. It is based on past experience, that's right.
Mr. Moore: That's all.

Redirect Examination

Q. (By Mr. Romley): On the basis of that past experience do you have an opinion as to the highest rate obtainable on a reasonably safe investment for the next ten or fifteen years?

A. If I was advising an insured or client of mine, and let's just take a hypothetical case.

Mr. Moore: I object, your Honor, and suggest that the witness just simply answer the question.

(Testimony of John Stilb.)

Q. (By Mr. Romley): Perhaps you can answer yes or no and then we will just follow through.

A. All right, yes.

Q. Now, what in your opinion is that rate and will it be for the next thirteen or fourteen years?

A. That rate would be, we would project, approximately three and a half percent looking to conserving of capital and getting a reasonable return so that the capital wouldn't be jeopardized.

Q. Have you found in your studies if interest rates go up, and then down again, and they just have your peaks and your valleys? [584]

A. Yes. Of course it's all in relation to the supply and demand of money, and of course in this tight money market that we are in now where the demand is great and the supply is not as great because of controls, et cetera, your interest rates are higher.

Q. Has there been any indication that they—the interest rates are going higher or that they are coming back down from what you have learned in your studies?

A. The indications are that the market, money market is loosening up and interest rates are coming down. The prime rate has dropped a little bit.

Mr. Romley: That's all.

Mr. Moore: That's all.

Mr. Romley: May Mr. Stilb be excused, your Honor?

The Court: You may be excused, sir.

Mr. Romley: At this time, if your Honor pleases, we re-offer Exhibit 13.

Mr. Moore: We have the same objection we made to the other exhibits, if the Court please.

The Court: It may be received. The Court will give it the weight it merits.

(Plaintiffs' Exhibit 13 received in evidence.)

Mr. Romley: We again rest, your Honor.

Mr. Moore: This time final? [585]

Mr. Romley: Yes.

(Plaintiffs rest.)

Mr. Moore: Mr. Liberman, will you be sworn, please.

MAURICE LIBERMAN

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): State your name for the record, please, sir? A. Maurice Liberman.

Q. Where do you live, Mr. Liberman?

A. In Albuquerque.

Q. And you are one of the partners in Duke City Lumber Company? A. Yes, sir.

Q. The other two partners are Joseph Grevey and Jack Grevey, your brothers? A. Yes, sir.

Q. Where were you born, Mr. Liberman.

A. In Poland.

(Testimony of Maurice Liberman.)

Q. How long did you live in Poland?

A. Twelve years.

Q. And then where did you live? [586]

A. France.

Q. Were you in business in France, later after you moved there? A. Yes, sir.

Q. What was your business?

A. Lumber business.

Q. How long were you engaged in the lumber business in France? A. Twenty-four years.

Q. When did you leave France and come, or when did you leave France? A. 1941.

Q. When did you come to the United States, right when you left France? A. Yes, sir.

Q. Why did you leave France?

A. On account of war conditions.

Q. When you came to this country, where did you first stay or stop?

A. I stayed in New York for about three months.

Q. Were you working in New York?

A. Oh, I had a temporary employment in a retail lumber yard.

Q. And then where did you move?

A. I moved to McNary, Arizona. [587]

Q. Did you have employment after you came to McNary? A. Yes, sir.

Q. By whom?

A. Southwest Lumber Mills.

(Testimony of Maurice Liberman.)

Q. And what type of work were you doing with Southwest Lumber Mills when you were first employed?

A. As a checker.

Q. Generally what are the duties of a checker?

A. They are to tally lumber into the trucks or cars when it's shipped out.

Q. How long did you work as a checker?

A. Oh, a short period, maybe a month or six weeks.

Q. Then what type of work were you doing?

A. I have been sent out to Magdalena, New Mexico.

Q. What were you doing in Magdalena?

A. As assistant manager of a concentration yard.

Q. That's where lumber was gathered, is that what you mean by a concentration yard?

A. Yes.

Q. That wasn't a saw mill but just a lumber yard, a gathering station for lumber?

A. It was a gathering station for lumber and a planing mill.

Q. And a planing mill. Now, when you were in the lumber business in France, what type of business were you doing there, [588] were you in the production or sales or what?

A. Well, I grew up from forest all the way up through saw mill, planing mill, sales, retail and wholesale.

Q. Were you in business for yourself in France or engaged in business with someone else?

(Testimony of Maurice Liberman.)

A. I have been—I started as an employee and before the war I became a junior partner.

Q. Was your business limited to France or were you selling your products in other places?

A. No, we were importing and exporting.

Q. Exporting to where?

A. All over the world.

Q. Now, at Magdalena, New Mexico, were you the manager or assistant manager of that operation for Southwest?

A. I was the assistant and then became the manager.

Q. How long did you remain there?

A. I don't recollect exactly but I would say about a year and a half.

Q. Then where did you go?

A. From there I went to Albuquerque, New Mexico.

Q. And engaged in what business or occupation at Albuquerque?

A. In concentration yard and planing mill.

Q. Were you still in the employ of Southwest?

A. Not directly. [589]

Q. Were you in business in Albuquerque for yourself or in some partnership or as an employee when you first went there?

A. When I first went there I went on behalf of a new company created by the McNary family, and was paid on a salary and bonus.

(Testimony of Maurice Liberman.)

Q. And what new company was that, was it a new type of business or a new company for them, which?

A. Well, it was a remanufacturing plant, custom milling plant.

Q. Custom milling of lumber?

A. Yes, sir.

Q. And how long did you remain in that position as an employee?

A. A short while, I would say from three to five months.

Q. Then what did you do?

A. Then we changed the arrangements, I leased the plant from them and became independent operator.

Q. And under what name were you operating that plant when you became the independent operator?

A. Under Transit Remanufacturing Company.

Q. And do you still do business in Albuquerque as Transit Remanufacturing Company?

A. Yes, sir.

Q. Is Transit—and we will refer to it only as Transit [590] rather than the whole name—is that a corporation or partnership or what is the business entity for Transit? A. A corporation.

Q. Who are the stockholders of that company?

A. My brothers and myself.

Q. Is it the same brothers who are partners with you in Duke City? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Now, Duke City Lumber Company, the partnership, does business where?

A. You mean as far as—I don't understand your question.

Q. As far as mills or production of lumber, so forth, do you have any operation other than the one at Winslow?

A. We have operations in New Mexico and Arizona.

Q. What operation do you have in Arizona other than this mill at Winslow, if any?

A. That's the only operation we have in Arizona.

Q. And now where are your operations, as you call them, in New Mexico?

A. Well, we have Albuquerque, Gallina, Cuba, El Rito, Vallecitos, there's another operation but I don't remember the name.

Q. Those that you have named, Mr. Liberman, are those mills that you operate yourself or are some of them operated under contracts or some of them you merely buy the production from? [591]

A. Some are operated by ourselves.

Q. Name those that are operated by yourselves?

A. Gallina and Cuba, and of course the Albuquerque operation and Winslow. We are talking now only New Mexico, excuse me.

Q. Yes, I was limiting because I know you operate the one at Winslow.

Do you actually have a saw—does Duke City actually have a saw mill operation in Albuquerque?

A. No, sir.

(Testimony of Maurice Liberman.)

Q. Well, I was limiting the question for the moment to saw mills. You mentioned two in New Mexico?

A. That's right, that's the Gallina and Cuba.

Q. Now, the other operations that you mentioned in New Mexico outside of Albuquerque, which ones of those are saw mills?

A. El Rito, Vallecitos. I remember now another one, that's the Dome Unit.

Q. And those are three saw mills that you have just mentioned. Do you buy the production from them, are they operated under contract, what is the arrangement?

Mr. Romley: You mean those latter three?

Mr. Moore: Those last three.

A. Well, they are different arrangements that we have. [592] Some we have where we participate as partners, 50 percent.

Q. Which ones are those?

A. The El Rito and Vallecitos.

Q. And now what about the other one you named, I won't try to pronounce the names.

A. The other one is also 50 percent arrangement, but not a partnership. We get 50 percent of the production.

Q. In other words, you buy 50 percent of the production from them, is that it, or at least under contract for you?

A. Well, it's a contracted mill. We own half of the timber and we get half of the production.

(Testimony of Maurice Liberman.)

Q. I see. Now, have we covered all of the operations up to this point in New Mexico other than Albuquerque?

A. We do have another one that's operated by a contractor belonging 100 percent to us, and that's one that I don't remember the name.

Q. Is that the one you mentioned, Dome or something?

A. No, no, that's besides the Dome.

Q. Now, what is your operation at Albuquerque as far as Duke City Lumber Company is concerned? You said you didn't have a saw mill, what type of an operation do you have in Albuquerque?

A. The planing mill with all that goes with it, in other words, kilns, sorting chains and a molding plant.

Q. Is the molding plant Duke City's operation or is that— [593]

A. No, sir, the molding plant, that's Transit.

Q. That's Transit.

A. That's right. The planing mill belongs to Transit. I'm sorry, I confused the ownership.

Q. The planing mill and the molding operation, that's the Transit Remanufacturing Company?

A. Yes, sir.

Q. Now, as far as Duke City, do you have any—you don't have a saw mill. Do you have any other plant there or is that just a concentration yard?

A. All the manufacturing facilities belong to Transit Remanufacturing.

(Testimony of Maurice Liberman.)

Q. And are there any facilities there other than manufacturing facilities is what I'm trying to get at, Mr. Liberman?

A. No, sir, they are offices.

Q. Your offices are there of Duke City?

A. The main office.

Q. Transit Remanufacturing and there is another unit there, or entity of Crown?

A. Crown Wood Products.

Q. Crown Wood Products. And is that a partnership or a corporation? A. Corporation.

Q. Are the stockholders the same as Transit?

A. Yes, sir. [594]

Q. That's you and your two brothers?

A. Yes, sir.

Q. What is the business of Crown Wood Products Company? A. Wholesale business.

Q. Wholesale of lumber? A. Yes, sir.

Q. Now the lumber that Crown wholesales, has that been manufactured into anything or is that just raw lumber? A. No, finished lumber.

Q. Finished lumber that you are wholesaling?

A. Yes, sir.

Q. When did you first have any negotiations or contacts with the Gallagher interests with respect to the operation of the mill that they had in Winslow? A. Late 1955.

Q. At that time you had not acquired any of the Aztec timber, had you? A. Well—

Q. Or were you—

(Testimony of Maurice Liberman.)

A. We were negotiating and we had committed ourselves.

Q. To acquire some of the Aztec timber?

A. Yes, sir.

Q. You had made that commitment to whom?

A. To the Southwest Lumber Mills.

Q. And you did later acquire some of the Aztec timber? [595]

A. Yes, sir.

Q. Approximately how much of the Aztec timber did you acquire from Southwest?

A. Sixty-two million plus.

Q. You were here this morning, Mr. Liberman, when Mr. Weinstein explained the map, Defendants' Exhibit D and the yellow squares on that, is that correct?

A. Yes, sir.

Q. Does that map as far as you can ascertain correctly show the location and extent of the Aztec timber that you acquired from Southwest?

A. Yes, sir.

Q. Now, when I say you I'm meaning Duke City Lumber Company, I'm not using the whole name. [596]

Q. At the time you said you had those negotiations with the Gallagher interest in late 1955, was that with respect to acquiring their mill or an interest in it, or what was that designed to lead to?

A. I was approached by Mr. Gallagher who learned about our purchase of the timber and he asked me if I would be willing to let them mill our timber for us.

(Testimony of Maurice Liberman.)

Q. I see. Was that the commencement of the negotiations which led up to the August 9, 1957, contract which is in evidence? A. Yes, sir.

Q. Let me ask you this, when did you first become acquainted with Mrs. Nagel or the Nagel company?

A. With the Nagel company, it is a guess, I don't remember, but I would say in 1947.

Q. Did you have any negotiations with Mrs. Nagel or the Nagel company with reference to the acquisition of Aztec timber or any other matter about the time you were negotiating with Mr. Gallagher?

Mr. Romley: You mean back in '55?

Mr. Moore: Yes.

A. Not in '55.

Q. (By Mr. Moore): Did you in '56?

A. Yes, sir.

Q. Was that with respect to milling timber or discussion [597] pertaining to milling of timber?

A. Yes, sir.

Q. Did you have any other negotiations with Mr. Gallagher with respect to the Aztec timber other than the milling arrangement?

A. Yes.

Q. What was that with reference to?

Mr. Romley: When, first?

Q. (By Mr. Moore): When was that, Mr. Liberman?

A. It was late '57 and during '58.

(Testimony of Maurice Liberman.)

Q. I am going to lead you just a little if the Court will permit. I had reference to the pooling agreement, Mr. Liberman?

A. The pooling, in '57.

Q. That was entered into in July?

A. July 30th, '57.

Q. Now, after you entered into the pooling agreement and the milling contract, did Arizona Timber Company mill some lumber for you in their mill at Winslow? A. Yes.

Q. When that milling started, was that the first time that you had, your company had entered the Winslow area insofar as the production of lumber was concerned? A. No, sir.

Q. Had you been there before? [598]

A. Before we made the pooling and the milling agreement we had another agreement prior. We got about four or five million feet of timber, of lumber from the burned timber.

Q. That was this, was that this same fire we were talking about this morning? A. Yes, sir.

Q. That was called the Dudley Lake fire, I believe? A. Yes, sir.

Q. Who milled that timber for you into lumber?

A. Arizona Timber Company.

Q. At Winslow? A. Yes, sir.

Q. And that was prior to your pooling agreement, was it? A. Yes, sir.

Q. And prior to the milling contract?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. When did you first learn, Mr. Liberman, that Arizona Timber Company was interested in or negotiating toward a sale of their mill at Winslow?

A. I don't understand the question.

Q. Had you had any negotiations prior to September of 1958 with the Gallagher interests with respect to a sale of their mill at Winslow?

A. Yes, sir.

Q. When was that? [599]

A. As far as the Winslow mill was concerned, September 10.

Q. My question was prior or before September had you had any negotiations with them with respect to the sale of their mill?

A. The Winslow mill?

Q. Yes, sir. A. No, sir.

Q. That was the negotiations that led up to the September 12, 1958 proposal which is in evidence as Plaintiffs' Exhibit 1, is that the agreement you referred to? A. Yes, sir.

Q. At the time that that proposal was executed did you deposit with Arizona Timber Company or with Mr. Gallagher a check? A. Yes, sir.

Q. In what amount? A. \$10,000.

Q. And do you recall when it was you got that check back? A. In November, '58.

Q. In November of '58. Had you learned prior to September 10th that Mr. Gallagher was offering his mill for sale to other people?

A. No, sir.

(Testimony of Maurice Liberman.)

Q. And on September 10th, when you had the negotiations [600] with him and read the proposal, the 10th or 11th, I may have the date wrong, that is dated September 12, had Mr. Gallagher advised you that he had an understanding that the Nagels had a right of first refusal on his mill?

A. The first I learned about it was in the first draft of the proposal.

Q. When you read it in the first draft of the proposal? A. Yes, sir.

Q. And that was incorporated into and carried into the final draft that was signed on September 12th? A. Yes, sir.

Q. When was the next time after September 12 that you had any word or message from Mr. Gallagher with respect to that proposal, Plaintiffs' Exhibit 1, that is the September 12th letter?

A. September 18th.

Q. How did you get that message?

A. I received a telephone call from Mr. Cavanaugh conveying a message to me from Mr. Gallagher, who was out of town.

Q. What was the message?

A. That the deal was off.

Q. Who was Mr. Cavanaugh?

A. Mr. Cavanaugh at that time was the controller of the Arizona Lumber Company. [601]

Q. That is Tom Cavanaugh? A. Yes, sir.

Q. And the same Mr. Tom Cavanaugh that has been here, he is now working for you?

(Testimony of Maurice Liberman.)

A. Yes, sir.

Q. In fact he was on the witness stand yesterday. On the 18th of September, Mr. Liberman, after you received that message from Mr. Cavanaugh, what did you do?

A. I called Mrs. Nagel.

Q. Called her on the telephone?

A. Yes, sir.

Q. For what purpose?

A. I wanted to find out if she bought or was buying the mill.

Q. Tell us as best you can the conversation you had with Mrs. Nagel by telephone on September 18th?

A. My question, after greetings, my question to her was if she was buying the mill, something to that effect, or if she bought the mill.

Q. How did you identify the mill, do you recall, in that conversation? A. The Winslow mill.

Q. I mean the Gallagher mill, or what did you call it?

A. I don't remember if I said Gallagher or Winslow mill.

Q. Go ahead, relate as best you can. [602]

A. Mrs. Nagel told me, no, she hasn't bought it, that she is not about to buy it because it would result a financial burden to her and she couldn't arrange for the financing. She told me then that she would like to see me and talk to me about it and asked me if I would be in Albuquerque. And I told her—she wanted to come to see me—I told

(Testimony of Maurice Liberman.)

her she didn't need to come to Albuquerque, I would fly out to Winslow. And I told her I would be there the next Saturday, which was two days later.

Q. Did you then go to Winslow on that Saturday you mentioned, which I believe would be September 20th?

A. Yes, sir. During that conversation also I told her I would call her Saturday morning to let her know at what time I was going to leave so Mr. Jenkins will pick me up at the airport.

Q. And did Mr. Jenkins pick you up at the airport on the 20th at Winslow? A. Yes, sir.

Q. Where did you go with Mr. Jenkins?

A. We went to the offices of the Nagel Lumber Company.

Q. Who was present during your conference there?

A. Mrs. Nagel, Mr. Jenkins and myself.

Q. Now, Mr. Liberman, instead of my asking specific questions, I want you to outline for the Court in substance as best you can the entire conversation there on September [603] 20th with Mrs. Nagel and Mr. Jenkins.

A. Of course this was a long conversation. The meeting lasted about, I would say three hours. I arrived in Winslow around 9:30 and to my best recollection I left somewhere around 12:30 or 1:00 o'clock. When we arrived at the office after the preliminary greetings and so forth, we started to talk business. Mrs. Nagel had in her hand several pages of computations and notes. She told me that she

(Testimony of Maurice Liberman.)

had an offer from Gallagher, an offer of the mill and timber, that the price for the mill was \$500,000, the timber 19.45.

Q. What does that 19.45—

A. 19.45 per thousand feet. That it was all cash, that she would have liked to buy the mill, she was very much interested in buying it, but she didn't have the money. That she contacted her banker and couldn't get the financing and also it would have been a burden to expand her business that much—this is not correct, absolutely correct words, but—

Q. I don't expect you to remember the exact words, the substance of it as best you can remember.

A. She told me they couldn't handle it and they were not going to buy it and they are going to tell so Mr. Gallagher. She asked me if I had any ideas, if we could work out some kind of a deal. At that time Mr. Jenkins reported that he had a conversation with Mr. Gallagher several days before, and that was during that Hoo-Hoo meeting in Las Vegas, Nevada, [604] and also in San Francisco during a freight rate hearing; that Tom Gallagher discussed with him the matter of the Winslow mill, and then he wanted an answer from them if they were going to buy it or not. And that Tom told him to come out to Albuquerque the next Tuesday, that Tom mentioned that he would like for the two of them to come by to see me. And I asked Mr. Jenkins for what purpose, and he told me that he

(Testimony of Maurice Liberman.)

didn't know. About that time Mrs. Nagel asked me what kind of ideas, if I had any ideas, what kind of a deal we could work out. I told her at that time that I had a proposition from Gallagher also for the identical price for the mill, \$500,000, that the timber was \$17. That it was terms, credit, but I got a call from Mr. Cavanaugh that the deal was off. I did tell her that I expected to revive that proposal, I didn't know what the message meant, and I thought at that time that I still had a deal with the Gallaghers and told her that my proposal would be to merge the two operations. In other words, the Duke City would acquire the Gallagher mill and the timber for themselves as the proposition was made to us and that I signed, and in that case we would have a mill, we would have timber, about the same amount or maybe a little bit more timber than the Nagels had and we merge the two together and we would have a sizeable, nice operation. That seemed to me the proper thing to do. And we discussed this matter further, up to a point where Mr. Jenkins [605] mentioned something that will necessitate about a million and a half dollars. I am going back to the prior conversation where Mrs. Nagel told me about the proposal that Gallagher made to them.

Mr. Romley: May I inquire, is this still at the same time? He said prior conversation. Does he mean on the same day?

(Testimony of Maurice Liberman.)

The Witness: Same day, yes. When we opened up the conversation Mrs. Nagel had several pages of data and projections made by Mr. Nelson, and she told me that they made some computations and that they found out they will need about a million two hundred thousand to one million four hundred thousand dollars of cash to purchase the mill from Gallagher. And that was where she said they couldn't handle it, couldn't get the financing and so forth.

Q. (By Mr. Moore): So that we understand, Mr. Liberman, that was a part of the earlier conversation that you have just related?

A. That is right. That was prior to my talking about the merger.

Q. When was it Mr. Jenkins mentioned the million and a half, was that while you were discussing merger?

A. When we discussed merger. During the conversation about merger he mentioned something a million and a half and I had in mind to ask him what it was, but Mrs. Nagel stated [606] then before we were getting to merger we should see how Duke City is going to behave in Winslow. In other words, their relations with Gallagher were very friendly, they were very good neighbors and they cooperated together and had a very harmonious situation out there and she didn't know how our experience was going to be. She said, "Well, we had better discuss things step by step and not get into merger immediately."

(Testimony of Maurice Liberman.)

From there the conversation went on to Duke City acquiring themselves the plant. In other words, the proposition Gallagher made to us, and timber. She asked me at that time if I would consider to have Mr. Jenkins manage the operation for Duke City and I told her, well, I would consider it. The conversation went on then to some personal matters. Mrs. Nagel explained why she would have liked to buy the mill. She was mostly concerned about timber supply, long range timber supply. In other words, after the Aztec timber would be cut out the remaining available timber per year would be only about eighteen to twenty million feet per year and she said would sustain only a single mill operation, efficient operation. And I told her, well, I understood her situation, but of course we had our timber there and we had to mill it and Gallagher wanted to sell the mill and that was the reason why I bought it. We got into discussions of personal things, about what my ideas about the future, my projections for ten years hence and so forth. And I told her [607] my children were growing up and I worked hard all my life and probably would want to retire sometime and that after we would operate the mill for seven years I would be willing to sell it. During that conversation at different intervals, I would say at least twice, Mrs. Nagel said, "These are only conversations, no commitments and we are just exchanging ideas." And I

(Testimony of Maurice Liberman.)

concurrred with her, I said, "Yes, we want to find out if we can work out a deal and how we can work it out. So we talked then about, conversation drifted to a fifty-fifty purchase. And I told her that I would be willing to go ahead on a fifty-fifty purchase. She then asked me again about Mr. Jenkins managing the plant and she asked me if Mr. Weinstein was already on our payroll. I told her no, he wasn't, that he would come with us after the purchase of the mill would be accomplished.

Q. Let me interrupt you there, Mr. Liberman. Had you discussed with Mr. Gallagher Mr. Weinstein's situation when you talked to Gallagher about the September 12 proposition, had you had any discussion about Weinstein?

A. I think so, yes.

Q. Do you know whether you had talked to Mr. Weinstein about it?

A. I suppose he did.

Q. That is Mr. Gallagher, you say you suppose he did?

A. That is right. [608]

Q. Had you had any discussions direct with Mr. Weinstein about working for you if you got this proposal carried out?

A. I don't remember.

Q. Very well. But your reference to Mr. Weinstein when you were talking to Mrs. Nagel was as a result of this conversation with Mr. Gallagher?

A. That is correct.

Q. I see. Now you were talking about Jenkins and you mentioned Mr. Weinstein too.

(Testimony of Maurice Liberman.)

A. That is correct. I told them Mr. Weinstein was still working for Arizona Timber Company and New Mexico Timber Company. I told Mrs. Nagel, I asked her if she thought that Mr. Jenkins was capable to manage their plant and the Gallagher plant after we acquired it, it would have been quite a job. And she turns around and discussed with him, asked him something and she told me yes, he could manage the two plants. So I told her I would consider it very seriously and let her know, that I have been watching him, that he has made quite some progress since I knew him, that he was a capable young man.

Our conversation then drifted to this fifty-fifty purchase. At that point Mrs. Nagel said again that they couldn't procure the money to buy the mill from Gallagher and they are not going to buy it and that she thought the [609] purchase of a fifty-fifty, on a fifty-fifty basis would be the right thing to do. And we so got to a conclusion of our conversations that if we could get a proposal for the purchase of the mill on the terms of the proposition that I had from Gallagher, in other words, if I could revive the proposal I have signed, that we will have the right to participate in the purchase of it, and that this agreement would last until April 30th. It was agreed that I will go back to Albuquerque and write up a written agreement and that we will sign it Tuesday when Mr. Jenkins was supposed to come to Albuquerque to see Mr. Gallagher.

(Testimony of Maurice Liberman.)

Q. Was there any discussion in that conversation, Mr. Liberman, with respect to your assisting the Nagels in financing a half interest in this thing if they participated in the purchase and needed assistance?

A. Well, Mrs. Nagel or Mr. Jenkins mentioned something that they had heavy inventories and that they would sell the inventories in the spring. And I told them that if we had a proposition and if we agreed to purchase the mill both and if she had any, if she needed some financial assistance I would help.

Q. Did you ever at any time during that conference or conversation say to them that you would buy the mill and at any time up to April 30th sell them an undivided one-half interest in it? [610]

Mr. Romley: I object to the question as leading and suggestive, your Honor.

The Court: He may answer.

A. No, sir.

Q. (By Mr. Moore): Did you ever at any time in that conversation say to them that you would agree that you would buy the mill and sell them half of it and that Mr. Jenkins could manage it?

A. No, sir.

Q. You said something, Mr. Liberman, about the fact that Mrs. Nagel said at least twice, and you concurred, that this is just conversation and not commitments. Was that during the discussion of merger and then later in the conversation prior, just before your leaving there?

(Testimony of Maurice Liberman.)

A. It was during the merger and even during the conversation about a purchase of fifty-fifty.

Q. Yes.

A. It was only at the end of our meeting, I would say maybe twenty minutes or thirty minutes before we concluded the end of our meeting that we got to a final conclusion and understanding.

Q. As a result of that understanding what were you to do?

A. I was to write up an agreement.

Q. Did you have any discussion about a fifty-fifty purchase of timber? [611]

A. No, sir.

Q. Did you have any discussion about the formation of a partnership for the operation of the business?

A. No, sir.

Q. Did you have any discussion about the formation of a new corporation to operate the business?

A. No, sir.

Q. Did you have any discussion with respect to who would put up the capital for the working capital of the business?

A. No, sir.

Q. Did you have any discussion with respect to how the working capital would be shared between the Nagel Company and your company?

A. No, sir.

Q. Did you have any discussion with respect to sales policies or a sales organization?

A. No, sir.

Q. Did you have any discussion with them with respect to what timber would go through the mill in the event it was purchased?

A. No, sir.

(Testimony of Maurice Liberman.)

Q. Did you have any discussion with them as to whether or not the Nagel timber would go through this mill or solely through their own mill? [612]

A. No, sir.

Q. Did you have any discussion with them with respect to whose assets would be pledged to secure the purchase price? A. No, sir.

Q. Do I understand, Mr. Liberman, that actually the only thing insofar as your understanding with the Nagels was that you would leave, go back to Albuquerque and prepare an agreement that you could each participate fifty per cent in the purchase of the mill if it could be purchased, was that your understanding?

Mr. Romley: We object, your Honor, leading.

The Court: Objection sustained.

Mr. Moore: I was merely trying to summarize. I realize as a question by itself it is leading.

Q. (By Mr. Moore): You left you say sometime, I believe you said 12:30 to 1:00 o'clock, somewhere in that area?

A. Somewhere in that area.

Q. And I assume you did go back to Albuquerque? A. Yes, sir.

Q. And you did prepare the letter of September 23rd that is signed and attached to the complaint in this action? A. Yes, sir. [613]

Q. Did you have a discussion with your brother, Joe Grevey, about the matter before you prepared the letter? A. Yes.

(Testimony of Maurice Liberman.)

Q. What was the subject of that discussion?

A. Well, we discussed, when I came back, I thought about this April 30th date and we discussed it, if it shouldn't be extended beyond that.

Q. And was that the reason you put in the letter the six months automatic extension provision at the end of it? A. Yes.

Mr. Romley: Object to that as leading and suggestive and based on hearsay.

Q. (By Mr. Moore): Did you do that as a result of your discussion with your brother, Joe Grevey?

Mr. Romley: Same objection.

The Court: Well, he could ask him how it happened that he extended it.

Mr. Romley: Well, we might get that answer and might not, I don't know, your Honor.

Q. (By Mr. Moore): I will adopt your Honor's suggestion.

How does it happen that you put the six months extension provision in the letter?

A. Well, the reason is that knowing Mr. Gallagher and my past experience, one day he was selling, the next day he changed his mind and we didn't know if we would have an [614] opportunity to buy it by April 30th, and to get the firm proposal from him was quite a job from my experience. So we decided to extend this thing.

Q. You say we, you and your brother Joe

A. Yes.

(Testimony of Maurice Liberman.)

Q. Discussed——

A. Yes, I discussed it with him.

Q. Did Mr. Jenkins come over to Albuquerque on the 23rd? A. Yes, sir.

Q. And he came to your office, I assume?

A. Yes, sir.

Q. Who was with him, if anyone?

A. Mr. Nelson.

Q. Do you recall, Mr. Liberman, whether the letter had been prepared at the time that Mr. Jenkins and Mr. Nelson came in or whether it was prepared after they got there?

A. No, it was prepared before they got there.

Q. And tell us as best you can what happened when Mr. Jenkins and Mr. Nelson came to your office on the 23rd?

A. Well, they came in there somewhere around, I would say 9:30 or so and told me that they had to go and see Gallagher at 10 o'clock. They asked me if I had prepared the letter and I said yes, and gave it to them. Mr. Jenkins read it and signed it.

Q. Do you recall whether there was any conversation between [615] you and Mr. Jenkins with respect to the letter or its contents or anything about it before he signed it?

A. No, I don't recall.

Q. You don't recall that there was any or you——

A. I don't think there was any.

(Testimony of Maurice Liberman.)

Q. Now, as, or before they left your office was there any discussion between you and Mr. Jenkins as to whether or not he should tell Mr. Gallagher about the agreement they had made with you?

A. All I recall is I told him not to tell Gallagher about our conversation and understanding that we made in September the 20th, in other words, about the letter of September the 23rd.

Q. Is that all the discussion that you recall at this time?

A. That's what I recall, that's about——

Q. Were you further contacted on the 23rd by either Mr. Jenkins or Mr. Nelson?

A. Yes, I received a telephone call in the afternoon, Mr. Nelson, he told me that they had seen Gallagher and told him that they couldn't handle, couldn't buy the mill, that they didn't have the money, and that Mr. Jenkins will call me, give me the details and will call me the next morning.

They had to leave in a hurry, I don't know the reason.

Q. Then did you receive a telephone call from Mr. Jenkins the next day? [616] A. Yes.

Q. What was the substance of that conversation?

A. Well, he told me that he went over to see Gallagher and told Gallagher that they couldn't buy the mill for monetary reasons, and that Tom Gallagher then made him another deal, another proposition just to buy the mill without the timber, and that he turned it down also.

(Testimony of Maurice Liberman.)

He then—he then asked me if I would be willing to confirm the statement I made September the 20th about the seven years and I told him yes, that I will write an agreement that it will be—that we are willing to commit ourselves to sell it on the appraised value for an experienced lumber man and that they will commit themselves to buy it.

Q. Did you prepare such a letter?

A. Yes, sir.

Q. And did you sign it? A. Yes, sir.

Q. Mail it to the Nagel Lumber and Timber Company? A. Yes, sir.

Q. Did you have a space provided at the bottom of that letter for acceptance to be signed showing acceptance of the letter agreement on behalf of Nagel? A. Yes, sir.

Q. You never got the letter back signed, did you?

A. No, sir. [617]

The Court: It's about three o'clock, we will take the afternoon recess.

(Short recess.)

Q. (By Mr. Moore): Mr. Liberman, just before the recess I believe we had finished your conversation with Mr. Jenkins by telephone on the 24th and the seven year letter agreement you say you prepared.

Do you recall when you next had a telephone conversation with Mr. Jenkins?

A. Yes, I had one the 10th of October.

(Testimony of Maurice Liberman.)

Q. Now, prior to the telephone call to Mr. Jenkins on the 10th of October, had you learned that Mr. Gallagher was making some accusations against you?

A. Yes, sir.

Q. Who did you learn that from?

A. Mr. Gallagher.

Q. What did Mr. Gallagher show you or did you see that established the fact that he was making some accusations?

A. Well, he showed me a wire that he sent to the Kaplans calling me——

Mr. Romley: Now, just a moment, I object. That is not the best evidence.

Mr. Moore: We don't have the wire, I'm going to ask him about it.

Q. (By Mr. Moore): Do you have a copy of that wire that [618] he sent to the Kaplans?

A. No, sir.

Q. What is your recollection as to what was in that wire that Mr. Gallagher showed you?

Mr. Romley: Same objection, also hearsay.

Mr. Moore: I'm offering it, if your Honor please, solely for the purpose of explaining that portion of the transcript of the telephone conversation on October 10th that he had with Mr. Jenkins. I think that it is relevant.

The Court: The transcript?

Mr. Moore: That exhibit of the—I can't remember the number. Defendants' Exhibit C in evidence. I'm not offering it to prove the truth of the document, your Honor, and I can get at it by what Gal-

(Testimony of Maurice Liberman.)

lagher said to this man that led up to this call and the statements there as to the charges that were being made against him.

The Court: Well, I don't see where that, I mean if you are not interested in the truth of it and you couldn't be, since it's hearsay, I don't know what enlightenment it would give me. Here is the phone call and we have that in evidence. But I don't see what help it would be for me to know what was in Gallagher's telegram, and unless I was to take as a fact or truth what is in there.

Mr. Moore: Let me get at it this way then:

Q. (By Mr. Moore): After the 24th of September, when did [619] you next see Mr. Gallagher?

A. I saw Tom Gallagher the 8th or 9th of October.

Q. Where was that? A. In my office.

Q. Was there anyone else present at that time?

A. Yes.

Q. Who?

A. Mr. Weinstein and Mr. Robert Gallagher.

Q. What was the purpose of Mr. Gallagher's coming to your office?

A. The purpose was to explain to me——

Mr. Romley: It's calling for a conclusion, your Honor, the purpose in another man's mind.

Q. (By Mr. Moore): Well, what was the substance of that conference, what was said?

Mr. Romley: We object to that as hearsay.

(Testimony of Maurice Liberman.)

Mr. Moore: Your Honor, we have had in this record conversations that everybody had with Mr. Gallagher, and from the very start.

The Court: Well, is there anything — in other words, there is a rule of the uncompleted matter. In other words, if anybody has testified to a part of a transaction and this relates to that, you are entitled to complete it, even though there was no objection to their stating hearsay. But I don't recall anything of that kind in this record. There are [620] conversations with Gallagher but not about this particular thing.

Mr. Moore: Well, ultimately I want to get into the additional negotiations with Gallagher which occurred with respect to other propositions pertaining to the sale of this property which will establish one purpose of the trip to New York on the 16th by Mr. Liberman, and the whole thing is tied together.

The Court: Well, this calls for hearsay, Mr. Moore. The objection is sustained.

Q. (By Mr. Moore): Prior to the 10th of October, had you had any further negotiations with Mr. Gallagher with respect to the purchase of the Winslow mill? A. Yes.

Q. When was that?

A. All during the 10th, 11th and 12th of September.

Q. Well, was there any negotiations with him prior to the 10th? A. Yes.

(Testimony of Maurice Liberman.)

Q. With respect to the purchase——

Mr. Romley: You mean the 10th of October?

Mr. Moore: October, yes.

A. The 8th of October.

Q. (By Mr. Moore): Give me the substance of those negotiations? [621]

A. Well, he came to see me together with——

Mr. Romley: Your Honor, again we are calling for hearsay here. I don't know where it's leading.

Mr. Moore: You do know where it's leading, Mr. Romley.

Mr. Romley: I do know, sir, that Mr. Liberman has gone much further in what he refers to the conversation of September 20th than he said in his deposition, very much further, and I don't know how much further he is going to go in what he says here. And he said that in his deposition that that was all of the conversation on September 20th.

Mr. Moore: If you want to argue the lawsuit I'd be delighted to argue it, Mr. Romley.

The Court: No, we are concerned with this matter on October 8th.

Mr. Moore: It's a series of negotiations, 8th, 9th and 10th. Let me do it this way, let me make an offer of proof, if your Honor please: I offer to prove that on October 8th, 9th and 10th, that Mr. Gallagher, and this will not be in the exact words of the witness, I don't recall the exact words, came to see Mr. Liberman and first made reference to his being a blackmailer and an extortionist and he

(Testimony of Maurice Liberman.)

had scared the Nagels off of the proposition that Gallagher was talking to them. There were then negotiations in which Mr. Liberman was advised that Gallagher, Weinstein, Cavanaugh, and a Mr. Wickens, were negotiating for the purchase of the Kaplan [622] interest in all of the property, New Mexico timber and Arizona timber including this property; that that matter was reported by Mr. Liberman, not in that much detail, to Mr. Jenkins on October 10th in the telephone conversation, a transcript of which is in evidence and which Mr. Jenkins says is correct insofar as he recalls.

The Court: Well, we have the telephone conversation here.

Mr. Moore: Yes.

The Court: And any conversation that this witness had with Mr. Jenkins in which he told him something about negotiations that Mr. Weinstein and others of that group would be admissible, there is no doubt about that. But the first part of it, about Mr. Gallagher saying that he is an extortionist and so on and so forth, that has nothing to do with this.

Now, I can see where it would be very dangerous, because Mr. Jenkins has testified that after the 20th they were all ready and willing and hoping that Mr. Liberman would get it, and they would have their interest in it. Now, if I accept that conversation with Mr. Gallagher in which this is all,

(Testimony of Maurice Liberman.)

why, then it just is admissible against Mr. Jenkins for impeachment of Mr. Jenkins, and it simply isn't proper because it's hearsay.

So that's the reason I sustain the objection. It has no purpose that I can see unless you accept it as truth or [623] fact, and it isn't fact, it's hearsay.

Now, I say anything that Mr. Liberman told Mr. Jenkins about negotiations that—the way they had switched and changed, and that Mr. Weinstein was in it—

Mr. Moore: That's in the telephone conversation, the transcript.

The Court: That's all admissible.

Mr. Moore: That's in the transcript.

The Court: But Mr. Gallagher's conversation with Mr. Liberman, no.

Mr. Moore: May I have that exhibit if your Honor please.

Q. (By Mr. Moore): Mr. Liberman, I will hand you Defendants' Exhibit C in evidence and ask you to look at that, take a moment and look it over and then I will ask you one question about it.

The name of Robin Bishop appears on the bottom of the third page of this exhibit. Was she your secretary on October 10th, 1958? A. Yes, sir.

Q. And she is still employed as your secretary?

A. Yes, sir.

Q. Now, after reading this exhibit—first, did you ask Mrs. Bishop to listen in on the telephone and transcribe the conversation verbatim that you had with Mr. Jenkins on that day? [624]

(Testimony of Maurice Liberman.)

A. Yes, sir.

Q. And does this exhibit correctly, according to your best recollection, set forth the exact conversation that you had with Mr. Jenkins on October 10th, 1958?

A. Yes, sir.

Q. Now, when did you go to New York after the 10th of October?

A. I left October the 12th.

Q. And arrived in New York on what date?

A. Same date, in the evening.

Q. And was it during that meeting in New York where the transaction—when the transaction was negotiated, culminating in the contract whereby Duke City purchased the Winslow mill that we have talked about and the other properties listed in that contract of November 6th?

A. Yes, sir.

Q. When did your negotiations terminate prior to the early morning of the 16th of October?

A. I don't understand your question.

Q. Well, let's start this way: Who did you carry on those negotiations with?

A. With the Kaplans mostly.

Q. When did you first meet with the Kaplans?

A. During that trip? [625]

Q. Yes. A. The 14th.

Q. Where was that meeting?

A. I first met Mr. A. I. Kaplan at his office.

Q. And was that on the 14th? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And did you have some negotiations or discussion with Mr. A. I. Kaplan about the ultimate purchase of the Winslow mill?

A. To some extent.

Q. Did you meet and discuss it with Mr. Jack Kaplan? A. Yes.

Q. When did you meet with Mr. Jack Kaplan?

A. The same morning.

Q. The 14th? A. The 14th.

Q. And when did you—or did you have any further meetings after the 14th with Mr. A. I. Kaplan?

A. No, sir.

Q. Did you have any further meetings after the 14th with Mr. Jack Kaplan? A. Yes, sir.

Q. When was that? A. The 15th.

Q. And where did that meeting take place? [626]

A. He came over to my room at the Essex House.

Q. The Essex House is a hotel in New York?

A. Yes, sir.

Q. That's where you were staying?

A. Yes, sir.

Q. On the 15th of October, when Mr. Jack Kaplan came over, who else, if anyone, was present?

A. Mr. Joseph Rosenthal.

Q. Just Mr. Rosenthal, Mr. Jack Kaplan and yourself? A. Yes, sir.

Q. And was that during the morning or the afternoon of the 15th, or do you recall?

A. During the morning.

(Testimony of Maurice Liberman.)

Q. And how long did that session, if I may call it that, last?

A. Oh, it lasted for several hours. We had lunch and we returned to my room after lunch and the meeting broke up I would say somewhere between four and five o'clock.

Q. Was Mr. Tom Gallagher present that day in your room? A. No.

Q. Did you have a further meeting on the 15th after this session that you say broke up in the afternoon? A. Yes.

Q. Where did you meet?

A. At Mr. Jack Kaplan's home. [627]

Q. And who was present—first let me ask you, at Jack Kaplan's home, did you have further negotiations and discussions with reference to the purchase of the Winslow mill?

A. I didn't hear you.

Q. At Jack Kaplan's home did you have further negotiations with respect to purchasing the Winslow mill from the Gallagher companies?

A. Oh, yes, all our negotiations.

Q. And who was present—first what time did you meet, approximately?

A. I would say around eight o'clock.

Q. And who was present at that meeting?

A. Well, Mr. Rosenthal was with me all day, Mr. Kaplan and then we saw the Gallaghers.

Q. When you got to—the Mr. Kaplan you mentioned, was that Jack Kaplan? A. Yes.

(Testimony of Maurice Liberman.)

Q. Was Mr. A. I. Kaplan present that evening at Jack Kaplan's home? A. No, sir.

Q. When you got to Jack Kaplan's residence do you recall whether Mr. Gallagher was present when you arrived?

A. They must have been in a separate room.

Q. They, you say, was there more than one?

A. Both the Bob and Tom Gallagher. [628]

Q. I don't think we have mentioned Bob Gallagher before. Is he related to Tom Gallagher as far as you know? A. Yes, sir.

Q. Brother? A. Yes, sir.

Q. So there was Mr. Rosenthal and yourself and Jack Kaplan and Tom Gallagher and Bob Gallagher? A. Yes, sir.

Q. Now, this is during the evening at Jack Kaplan's home? A. Yes, sir.

Q. Now, was there anyone else present?

A. No, sir.

Q. And during that evening did you have negotiations with respect to the purchase of the Winslow mill? A. Yes, sir.

Q. And what time did that session break up?

A. Two o'clock in the morning.

Q. What conclusions had you reached at two o'clock in the morning with respect to your negotiations?

A. Well, we had a proposition—oh, I should say an offer that they were willing to sell the mill, \$650,000 and remaining timber at \$17.

(Testimony of Maurice Liberman.)

Q. Was there any time fixed in your discussions as to when that offer was to accepted or rejected?

A. Yes, sir. [629]

Q. What time was fixed?

A. Eleven o'clock a.m.

Q. The same day at eleven o'clock a.m., is that right?

A. Same day, yes, sir.

Q. Was it your understanding that you were the only one that had the right to accept or reject or was the propostion that either side could accept or reject at eleven o'clock in the morning?

A. Either side.

Q. After you broke up at two o'clock in the morning where did you go?

A. We went back to the hotel.

Q. By we you mean who?

A. Mr. Rosenthal and myself.

Q. Now, the next morning or the same morning—first I assume you did sleep some?

A. We did.

Q. Did you call your brother, Joe—first, was Joe Grevey, your brother, with you in New York?

A. No ,sir.

Q. Where was he? A. In Albuquerque.

Q. Did you call your brother, Joe Grevey, the morning of the 16th? A. Yes, sir. [630]

Q. Did you call Mrs. Nagel on the morning of the 16th? A. Yes, sir.

Q. About what time was it when you called Mrs. Nagel?

A. Around nine o'clock New York time.

(Testimony of Maurice Liberman.)

Q. Had you called your brother, Joe Grevey, before you talked to Mrs. Nagel or before you called Mrs. Nagel at nine o'clock? A. Yes, sir.

Q. Had you reported to your brother the substance of the offer which you had with respect to this purchase? A. Yes, sir.

Q. Did you have a discussion with your brother, Joe, about your telephoning Mrs. Nagel?

A. Yes, sir.

Q. Did you have some discussion with your brother, Joe, about the terms, purchase price and the proposition and whether or not it should be accepted by you? A. Yes, sir.

Q. Was your brother, Joe, agreeable to accepting the proposition before you talked to Mrs. Nagel?

Mr. Romley: I object to that as based on hearsay.

A. No, sir.

Q. (By Mr. Moore): Then you say you called Mrs. Nagel?

Mr. Romley: Just a moment, just a moment.

Mr. Moore: Well, the witness had answered. [631]

Mr. Romley: Well, I may move to strike it.

Mr. Moore: All right, move.

Mr. Romley: Well, withdraw the objection, your Honor.

The Court: Very well.

Q. (By Mr. Moore): You called Mrs. Nagel, you say, about nine o'clock New York time?

A. Yes, sir.

Q. Where did you place that call from?

A. My room.

(Testimony of Maurice Liberman.)

Q. At the Essex House? A. Yes, sir.

Q. Was there anyone present in your room—well, first I'm getting the cart ahead of the horse, excuse me.

Did you complete that call to Mrs. Nagel?

A. Yes, sir.

Q. And did you have a conversation with Mrs. Nagel at that time by telephone? A. Yes, sir.

Q. You placed the call to her at Winslow, Arizona? A. Yes, sir.

Q. Was there anyone present in your room while you were talking to Mrs. Nagel? A. Yes, sir.

Q. Who was that? A. Mr. Rosenthal. [632]

Q. Now, Mr. Liberman, as best you can from your recollection, outline for me the substance of the conversation that you had with Mrs. Nagel at about nine o'clock New York time on the morning of October 16th, 1958?

A. Well, I excused myself for calling her so early in the morning, and then I told her the reason why I did, because I had to give an answer at eleven o'clock.

I reported to her my activities in New York, that I have seen the Kaplans, they had told me that they tentatively made a deal with the Gallagers to sell them all of their properties. I mainly wanted to see them about these accusations of blackmailing and so forth, but finally we got, after negotiations, spending all day the previous day with Mr. Rosenthal together and negotiating with the Kaplans, and

(Testimony of Maurice Liberman.)

spending most of the night with them we got to—we got them to give us a proposal for the mill at \$650,000 and the timber, \$17. I told Mrs. Nagel that I had to give an answer at eleven o'clock and wanted to have her answer if she wanted to participate in the purchase.

I explained to her that I had to accept, they asked me \$750,000 for the mill and finally they went down to \$650,000. The acceptance was to be done at eleven o'clock, that I wanted her to participate and to come out to New York. [633] And I gave her about all the terms we had discussed that evening. She told me that it was a high price for the mill. She made some remarks about that the price for the timber was also high on account of the market conditions at that time. That previous to that I told her that as far as we were concerned we were willing to go ahead and make the deal for our fifty percent and that I wanted to have her answer. She said it was a very big commitment and that she had other troubles and after some kind of hesitation as if after she thought about it, she told me, "No, I don't want to participate, we are not interested, I have enough troubles, enough responsibilities," something to that effect. Then she told me if we wanted to buy the plant and timber ourselves to go ahead and do it. I told her then to send me a wire to confirm our conversations that she is not interested and to release me from any obligations because if we were

(Testimony of Maurice Liberman.)

going to buy ourselves the mill it was a substantial purchase and we had to make financial arrangements and I didn't want to commit myself.

Q. You mentioned terms, Mr. Liberman, in that first conversation; you said you told her the price of the mill was \$650,000? A. Yes, sir.

Q. Is that the only terms you gave her in the first conversation? [634]

Mr. Romley: I object, your Honor. That is not the testimony. He said: I gave her all the terms we discussed. That is his exact language.

The Court: He may answer this question.

A. No, I didn't tell her about the terms, in other words, the credit.

Q. (By Mr. Moore): You mean you didn't tell her whether it was cash or credit by that?

A. Yes, sir.

Q. Now, did you have a second telephone conversation with Mrs. Nagel the morning of the 16th?

A. Yes.

Q. How soon was that after the first conversation? A. Within two or three minutes.

Q. Why did you make the second call?

A. I made it because Mr. Rosenthal called to my attention that in my conversation with Mrs. Nagel I didn't give her the credit terms, the payment and I told him I was surprised——

Q. No, not the conversation. After Mr. Rosenthal mentioned that to you did you call Mrs. Nagel again?

(Testimony of Maurice Liberman.)

A. I immediately picked up the phone and got her again.

Q. Did you have a second conversation with her within a few minutes after the first on the morning of the 16th? A. Yes, sir.

Q. Relate for me as best you can the substance of your [635] second telephone conversation?

A. I told her that Mr. Rosenthal called to my attention that I haven't given her the payment terms and that I excused myself and told her it was for credit. I repeated again the price for the mill, the price for the timber, gave her the terms, five years for the mill and I think three years for the timber. And I told her that I hoped and insisted that this may change her mind and that she will change her mind and participate in the purchase, that we wanted her to participate. We wanted her help because we wanted to share the burden in taking on such an obligation. I asked her again to come to New York and repeated quite a good part of our previous conversation and insisted to make her change her mind. But she said no, she didn't, no, she wasn't interested and repeated the same thing, same reason, didn't want to take on more obligations and so forth. After I was satisfied that she made up her mind I asked her if she sent a wire and she told me, "No, I haven't sent it yet, the telegraph office is opening only at 8:00 o'clock." I insisted for her to sent it to me because I needed it and had to give an answer at 11:00 o'clock and firm up the deal.

(Testimony of Maurice Liberman.)

Q. Was there any discussion about the telegram covering both letter agreements, the 23rd and 24th letters with reference to the seven year projection?

A. Yes, sir. [636]

Q. What was the discussion about that?

A. That was during the first conversation. Mrs. Nagel asked me if I also wanted a release on the second letter, I said, "Yes, if I commit myself to buy the mill for ourselves one hundred per cent I will have to have clean deal."

Q. At that time did you know whether or not Mrs. Nagel had signed the second letter, the letter of the 24th accepting it as an agreement?

A. I thought she had signed it.

Q. You had not received it back from her signed, however? A. No, sir.

Q. You mean you assumed she had signed it, or you had any information which caused you to believe she had or hadn't?

A. No, I assumed she had signed it.

Q. Have you completed the substance, Mr. Liberman, of the second telephone conversation with Mrs. Nagel?

A. I don't recall the exact words in the conversation.

Q. I understand. A. But this was about it.

Q. After you had the second conversation with Mrs. Nagel did you again telephone your brother Joe Grevey in Albuquerque? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Did you report to him Mrs. Nagel had refusal to deal, she wasn't interested in it, she didn't want to participate [637] and was sending you a telegram accordingly? A. Yes, sir.

Q. Did you then have some discussion with your brother Joe Grevey about the advisability of Duke City going ahead and purchasing the mill by yourselves? A. I didn't hear you.

Q. You didn't hear me. Did you have some discussion with your brother Joe Grevey about Duke City going ahead and purchasing the mill by yourselves without Mrs. Nagel's participation?

A. Yes, sir.

Q. Was your brother Joe in favor of it at first?

Mr. Romley: Just a moment. We object to that, if Your Honor pleases, calling for hearsay.

Mr. Moore: You want me to relate the conversation, we can relate it all?

Mr. Romley: It is still hearsay.

Mr. Moore: No, it isn't. That is admissible and we have got the law to establish it.

The Court: On what theory, Mr. Moore?

Mr. Moore: I have a memorandum on it. We don't have it? We do have a memorandum prepared which I will hand the Court and give Mr. Romley a copy of it. We unloaded the brief case and left it at the room. For the time being I will pass that until we can give the Court a memorandum on [638] it.

The Court: Is it the Hillman case, Hillman Mutual Life, state of mind?

(Testimony of Maurice Liberman.)

Mr. Moore: I don't remember which case it is.

Mr. Pfisper: That is correct, your Honor.

Mr. Moore: We have other evidence too on that, but I can pass that for the time being.

The Court: I am familiar with the Hillman principle. It is pretty hard to figure out where it begins and ends, but as far as state of mind or purposes concerned, it might be admissible for that. I think it would be limited to this man's state of mind, not Mr. Grevey's.

Q. (By Mr. Moore): Did your brother Joe object to you in the telephone conversation to your going ahead without the participation by the Nagel Company in the transaction?

Mr. Romley: Same objection, your Honor, that is necessarily based on hearsay.

Mr. Moore: That is a fact and our law will establish that admissibility, I think our memorandum will.

The Court: It is sustained for the present.

Mr. Moore: Thank you.

Mr. Romley, if you wish we will give you a copy of that memorandum. You are going to leave right away?

Mr. Romley: I will stay over and pick up the memorandum from you.

Mr. Moore: It is a very short one. [639]

Q. (By Mr. Moore): Let me ask you this. Was Mr. Rosenthal present in your room at the Essex House during all of your second telephone conversation with Mrs. Nagel? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Was he present in your room during your second telephone conversation with your brother Joe Grevey?
A. Yes, sir.

Q. Did Mr. Rosenthal also talk on the telephone to your brother Joe Grevey about this transaction after you had had both of the calls with Mrs. Nagel?

A. Yes, sir.

Q. Did you meet with Mr. Gallagher at or about 11:00 o'clock A.M. on the 16th of October in New York?
A. Yes, sir.

Q. Which Mr. Gallagher did you meet?

A. Tom Gallagher.

Q. Was there anyone with Tom Gallagher?

A. Yes, sir.

Q. Who was that?
A. Mr. Cavanaugh.

Q. Tom Cavanaugh?
A. Yes, sir.

Q. Had Tom Cavanaugh been in attendance in any of the conferences and negotiations you had had with the Gallaghers or Kaplans prior to 11:00 o'clock on the 16th? [640]
A. No, sir.

Q. Was Mr. Rosenthal still with you at or about 11:00 o'clock when you met Tom Gallagher and Tom Cavanaugh?
A. Yes, sir.

Q. Where did you meet them?

A. They came over to the hotel.

Q. And I believe you said that was at or about 11:00 o'clock. Can you fix the time any more accurately?

A. I would say very close to 11:00 o'clock, within five minutes.

(Testimony of Maurice Liberman.)

Q. Was there any further negotiations with Tom Gallagher with respect to this purchase, at 11:00 o'clock? A. No, sir.

Q. What did you tell Mr. Gallagher about the transaction at 11:00 o'clock?

A. That we accepted the deal.

Q. And what did Mr. Gallagher then do?

A. He left and went to see the Kaplans' lawyers to start the drafting of the agreement.

Q. Do you know that lawyer's last name?

A. Mr. Burlach.

Q. After Mr. Gallagher left to go to Mr. Burlach's office, what did Mr. Cavanaugh do, did he leave or remain there?

A. No, he remained with us.

Q. What did you and Mr. Cavanaugh and Mr. Rosenthal do? [641]

A. We started to discuss certain details that would come up in connection with the agreement.

Q. Then did you go to lunch? A. Yes, sir.

Q. The three of you together? A. Yes, sir.

Q. Do you have any recollection as to the approximate time that you went to lunch?

A. Oh, I would say 12:30 or 1:00 o'clock.

Q. Was that in the dining room there in the hotel? A. Yes, sir.

Q. Did you receive a telegram from Mrs. Nagel on the 16th? A. Yes, sir.

Q. What time did you receive it?

A. After we left the dining room.

(Testimony of Maurice Liberman.)

Q. What time was that, approximately? I assume you mean after you left the dining room at lunch? A. Lunch, yes, sir.

Q. At approximately what time?

A. I would say around 1:30 or so.

Mr. Moore: That telegram—

Mr. Romley: It is in evidence. I think we read the time of transmittal from Winslow and its reception—

Mr. Moore: In New York. [642]

Mr. Romley: At the hotel.

Mr. Moore: Not the hotel.

Mr. Romley: You are right, received at the hotel 11:29.

Mr. Moore: No, not the hotel. That is the time it is received at the Western Union office. We don't know what time it was received at the hotel.

Mr. Romley: You are correct.

Q. (By Mr. Moore): You were here during the trial, Mr. Liberman, do you remember the telegram or a copy of the telegram introduced in evidence as Plaintiffs' Exhibit 2? A. Yes.

Q. Is that a copy of the telegram you just referred to that you received? A. Yes, sir.

Q. After you received that telegram, what if anything did you do with respect to a further telephone conversation with Mrs. Nagel?

A. Yes, we went up to our room, Mr. Rosenthal and myself and I put in a call immediately to Mrs. Nagel.

(Testimony of Maurice Liberman.)

Q. Was that call completed at that time?

A. No, sir.

Q. Was it later completed that day?

A. Yes, sir.

Q. At about what time New York time was [643] that call completed? A. Around 6:00 o'clock.

Mr. Moore: We can stipulate to the time difference?

Mr. Romley: Three hours.

Mr. Moore: That is three hours difference. If it has not been established, if the Court please, I believe counsel will stipulate with me that the time differential between New York and Winslow, Arizona on October 16th, 1958 was three hours.

Mr. Romley: That is correct, your Honor.

Q. (By Mr. Moore): Where were you, Mr. Liberman, when the third telephone call was completed? A. In my room.

Q. At the Essex House? A. Yes.

Q. Was anyone present with you in your room?

A. Yes, sir.

Q. Who was that? A. Mr. Rosenthal.

Q. Will you relate for me as best you can the substance of your third telephone conversation with Mrs. Nagel on the 16th of October, 1958?

A. Mrs. Nagel called me back, completed——

Q. Returned your call?

A. Returned my call. And I asked her immediately why [644] she sent me such a wire, it contradicted our agreement of the previous two conversations. I offered her to participate, she told me she

(Testimony of Maurice Liberman.)

wasn't interested. And I told her that even so this deal was a new deal we made with the Gallaghers, that I wasn't sure it was subject to their agreement of September 23rd. I wanted her to participate and I didn't care if she had a right or didn't have a right, what I wanted was for her to come in with us. And I offered her an additional 48 hours, if she wanted to participate I told her I would wait 48 hours more. I told her I had accepted the deal with the Gallaghers and that they were drafting the agreement and I told her to come out to New York, that I wanted her, she was welcome, even she told me before she didn't want to participate, I still told her that is all right, but I will have to have an answer, a wire from her within the next twenty-four hours and I expected to commit myself financially the next morning. At that time Mr. Luffey, president of the Albuquerque National Bank, just arrived from New York. I found that out from my office earlier in the afternoon and they called my hotel and I was supposed to have a meeting with him. I told Mrs. Nagel I wanted to know exactly if she wanted to participate, to take care of the negotiations, to let me know within twenty-four hours. And I gave her forty-eight hours to commit herself. I insisted she would have to come out to New York and I again told her we needed her, it was a [645] big deal, we didn't want to take on all the responsibility. It involved quite a bit of money. She told me something that Bob wasn't there and that she will let me know.

(Testimony of Maurice Liberman.)

Q. Did you hear from her either within twenty-four hours or forty-eight hours? A. No, sir.

Q. Have you given us the outline of the substance of the entire conversation?

A. To the best of my recollection.

Q. Was there any agreement or memorandum of agreement up at New York concerning this purchase? A. Yes, sir.

Q. Was that signed or initialed by the respective parties? A. Yes, sir.

Q. Which, was it signed or initialed?

A. Initialed.

Q. Initialed on each page. And then later did you have a meeting in Albuquerque when the final draft of the contract of November 6th, 1958 was prepared and signed? A. Yes, sir.

Q. And did you take over the operations of the Winslow mill in accordance with the schedule set up in the November 6th, 1958 contract?

A. Yes, sir. [646]

Q. When did you next hear from Mrs. Nagel or Mr. Jenkins after the 16th of October, 1958, with respect to this transaction?

A. I saw Mr. Jenkins I think the 15th or 16th of November.

Q. Where did you see him?

A. At the airport—I saw him in Prescott and then I saw him the same day in Phoenix at the airport.

(Testimony of Maurice Liberman.)

Q. And did you have any conversation or discussion with Mr. Jenkins or he with you with respect to this transaction?

A. Well, he just mentioned if I was going to be in Winslow and I told him yes. And he asked me to come over there, that they would like to see me in connection with this Winslow plant.

Q. Did you go to Winslow? A. No, sir.

Q. Why not?

A. I became sick shortly after I returned to Albuquerque.

Q. Were you hospitalized as a result of that sickness? A. Yes, sir.

Q. When did you next see or have any discussion with Mr. Jenkins or Mrs. Nagel about this transaction?

A. Mr. Jenkins came over to Albuquerque to our office the 24th of December.

Q. And did you discuss with him or he with you this [647] transaction?

A. Yes. He told me he came over and wanted to see the contract we have signed with the Gallaghers.

Q. And did you show him the contract?

A. No, sir.

Q. Was the meeting all at your office, or was that one of the times that has been mentioned that you went to Judge Johnson's office?

A. We went over to Judge Johnson's office.

Q. You had some further discussion there about it? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Did Mr. Jenkins on that occasion say that they wanted to exercise their option or was he merely inquiring or asking to see the contract?

A. He was just asking to see the contract.

Q. And did you show him the contract that day?

A. No, sir.

Q. When was the next time you had any discussion with Mr. Jenkins or Mrs. Nagel with respect to this matter?

A. We had a meeting in Albuquerque in Judge Johnson's office January 6th.

Q. That would be January 6th, 1959?

A. '59.

Q. On that occasion did you show—first,—I got the cart ahead of the horse. Who was present, Mr. Liberman, at [648] that meeting?

A. Mrs. Nagel, Mr. Jenkins, Mr. Cox, Judge Johnson.

Q. You mean Mr. Jim Cox, the gentleman over here?

A. Yes, sir, Judge Johnson and myself.

Q. At that meeting did you show the contract, the November 6th, 1958 contract to Mrs. Nagel and Mr. Jenkins and Mr. Cox? A. Yes, sir.

Q. And did they go to some other room in Judge Johnson's offices to read the contract?

A. Yes, sir.

Q. Did they return, did you have some further meeting with them after they had read the contract? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Give me as best you can your recollection of the discussions or statements that were made, either by you or Mrs. Nagel and Mr. Jenkins, or Mrs. Nagel on that occasion.

A. Their contention was that our agreement of September 23rd was effective until April 30th and that they had the right to come in after April 30th.

Q. You say that was their contention. Did one of them say that in effect? A. Yes, sir.

Q. Which one, do you recall?

A. I would say Mr. Cox was the spokesman for the group. [649]

Q. I didn't ask you for what Mr. Cox said—but go ahead. Just proceed, Mr. Liberman, with your recollection of what was said.

A. I told them about my conversation with Mrs. Nagel, that I had no obligation as far as the September 23rd agreement. That I called her in New York, that I asked her to participate, that I gave her the terms, I gave her additional time in my last conversation, that she didn't wire me. She told me before I accepted the deal and committed myself, and I committed myself on what she told me during the first two conversations. I made my commitment on the basis because she told me she doesn't want to participate and she wasn't interested. So I went ahead and made my commitment; and that I felt I have done everything as far as I was concerned to comply with our September 23rd agreement and I felt I had no obligation whatsoever.

(Testimony of Maurice Liberman.)

Q. At that meeting when you recited the substance of what you told me with respect to your telephone conversations with Mrs. Nagel, did Mrs. Nagel deny that what you had said was covered in those telephone conversations with her?

A. No, sir. Most of our conversation was the question of interpretation of the agreement of September 23rd.

Q. But you say you did relate in substance what you had said and what Mrs. Nagel had said in these telephone conversations? [650]

A. That is correct.

Q. My question is, did she deny what you said was covered in those telephone conversations?

A. No, sir.

Q. What was said, if anything, by Mrs. Nagel or Mr. Jenkins with respect to being ready, willing and able to perform and they demanded the right to exercise their option and buy into this thing in the January 6th meeting? A. Nothing.

Q. After they read the contract did Mrs. Nagel make any comment to you about the contract or transaction that you recall? A. Yes.

Q. What was it?

A. She said it was a good contract. [651]

Q. Mr. Liberman, after the January 6th, '59, meeting did you have any further meetings with Mr. Jenkins or Mrs. Nagel? A. Yes, sir.

Q. When was that?

A. March the 8th, I think.

Q. Sometime in March? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And where was that meeting?

A. It was a Sunday at Judge Johnson's office.

Q. In Albuquerque? A. In Albuquerque.

Q. Who was present at that time?

A. Mr. Jenkins, Mr. Cox, Judge Johnson, Joe Grevey, and myself.

Q. Did Mr. Jenkins make any statement to you in that meeting that they were ready, able and willing to perform and make you an offer of performance of their obligations under their claimed option? A. No, sir.

Q. Did you have any further meetings with Mr. Jenkins or Mrs. Nagel after the March meeting, prior to the filing of this lawsuit? A. No, sir.

Mr. Moore: Your Honor, there are some other matters [652] I need to cover and very frankly I'm weary, and I know Mr. Romley cannot complete his cross examination. If it's not imposing on the Court I would suggest a recess.

The Court: We will recess until 9:30 on Tuesday morning, that's 9:30 Tuesday morning. [653]

(Whereupon, a recess was taken from approximately 4:20 o'clock p.m. on May 6th, 1960, until 9:30 o'clock a.m. on May 10th, 1960.)

May 10, 1960, 10:00 O'clock A.M.

MAURICE LIBERMAN

resumed the witness stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Moore): Mr. Liberman, in your discussions with Mrs. Nagel and Mr. Jenkins on September 20th, 1958, did you make any statement to the effect that you saw no reason to change the milling contract, that you let it continue?

A. No, sir.

Q. Did you have any discussion with respect to the operation of this mill after it might be purchased? A. No, sir.

Q. And a continuation of the milling contract?

A. No, sir.

Q. Mr. Liberman, what was your understanding of the provisions in the September 23rd letter?

Mr. Romley: Just a moment, if your Honor please, I object to that as calling for a conclusion. He may state what was said, not his understanding.

The Court: No, he may answer. [654]

A. My understanding was that we had the right to purchase together when we had a proposition made to us on a fifty-fifty basis, and that our agreement, this agreement would last to April 30th.

Q. What was your understanding of the agreement lasting to April 30th?

(Testimony of Maurice Liberman.)

A. That if we had a proposition after April 30th at any time that we had the right, either party had the right when we got a proposition to purchase fifty per cent.

Q. What was your understanding of the words in the agreement "participate in the purchase"?

A. To buy together when we had the proposal, at the time we had the proposal.

Q. Now, Mr. Liberman, we have referred several times here during the trial to the pooling agreement that you had with Arizona Timber Company, the agreement of July 30th, 1957. How was that matter handled in your negotiations and the conclusion of your transaction with the Gallagher companies?

A. You mean on October 18th—October 16th?

Q. No, I mean in your negotiations, first how was that matter handled in the proposal you had from Gallagher, the September 12th proposal?

Mr. Romley: We object to that as not the best evidence, your Honor, that document is in evidence.

The Court: That is in evidence here, is it not?

Mr. Moore: Yes.

The Court: Isn't the contract the best evidence of how it was handled?

Mr. Moore: Well, I will withdraw that question.

Q. (By Mr. Moore): How was the pooling agreement handled in the final conclusion of your transaction with Gallagher?

A. September 12th?

(Testimony of Maurice Liberman.)

Q. No. When you went to New York and negotiated this purchase and drew up a contract, how was the pooling agreement handled?

Mr. Romley: Same objection, your Honor. That contract of November 6th is in evidence.

The Court: Objection sustained. Isn't this what we talked about the other day, the pooling agreement, or was it the milling agreement?

Mr. Moore: We talked about both, your Honor. What I want to show by this witness is the actual—I am not getting through to him—the actual operation of the termination of that agreement and the adjustment of the account, because——

Mr. Romley: That question I have no objection, the adjustment of the account. I didn't understand.

Mr. Moore: That is what I meant by how it [656] was handled, that was what I wanted to get at.

The Court: You mean after the agreement, formal agreement?

Mr. Moore: How they negotiated it and how they closed up their obligations one to the other under that pooling agreement, that was what I wanted to get at.

The Court: You may ask him that.

A. We terminated the pooling agreement, rescinded it and went back to the original positions. In other words, Mr. Gallagher had so much timber and we had so much and as the timber we got and shipped and disposed of were from his cuttings,

(Testimony of Maurice Liberman.)

from his timber rights, he told me I owed him that much money for it and I agreed to pay him in notes.

Q. (By Mr. Moore): You say that timber was cut under that agreement from his cutting rights. You mean that was timber that originally had belonged to Gallagher which he was obligated to pay the stumpage on? A. Yes, sir.

Q. And all of that timber that was cut under the pooling agreement, had Arizona Timber Company paid the stumpage cost on that timber?

A. Yes, they paid for it.

Q. And then in your final negotiations, as I understand you, you negotiated with Mr. Gallagher as to the price for stumpage which he had paid on timber that had been cut and [657] which Duke City obtained the lumber from?

A. That is correct.

Q. Do you recall approximately what that figure was in dollars? A. About \$317,000.

Q. \$317,000 approximately?

A. That is right.

Q. Now, Mr. Liberman, you have heard the evidence and you have been here in the courtroom all the time during the trial? A. Yes, sir.

Q. And you have looked at copies which Mr. Romley furnished to me of the exhibits 9 through 13, is that correct? A. Yes, sir.

Q. Mr. Liberman, do you recall that on one of these exhibits, and it is number 13, it shows timber by years and it shows from 1959 to 1963, inclusive,

(Testimony of Maurice Liberman.)

30 million feet per year. Then in '64 it drops to 16 million feet, and from then on it drops to 12 million and then down to 10 million. Does that direct your attention to the provisions of this exhibit?

A. Yes.

Q. Let me ask you, Mr. Liberman, when the available timber supply, as indicated on this exhibit, drops to 12 million or 10 million feet per year, would it be possible [658] to have an economic operation and an economically feasible operation of the existing mill and facilities at Winslow which you purchased; in other words, could you operate that plant with a supply of only 10 or 12 million feet per year?

A. No, sir.

Q. Why not?

A. Economically it is impossible.

Q. Why? Explain it.

A. Because you can't—well, the best explanation, I will say you can't use a three ton truck to do a job of a pickup job. This mill, the operation is all set up to handle 30 million feet. We have power costs, we have maintenance of highways that are going to stay the same. We have management that is going to stay the same. I would say also to start from the woods that our contractor that is logging for us, 30 million feet per year at the present price is certainly going to ask for more money because he has equipment for 30 million feet and if he is cut down to 10 or 12 million feet he can't survive, so we have to pay him a higher price. Maintenance of roads. If we use ten trucks or 15 trucks or use

(Testimony of Maurice Liberman.)

two trucks we will have to maintain the road the same way, that will be the same. The next step, I would say maintenance of the plant. If we cut 10 million feet or cut 30 million feet, it will be practically the same amount. It is old equipment in poor shape and has to be maintained [659] and that is quite a sizeable expense. Personnel. We can reduce some of the personnel, but not in proportion. So in my opinion it is impossible to run the mill, the present mill for 10 million feet operation.

Q. On the present plant and equipment, is insurance a substantial item?

A. Yes, sir, that is a very substantial item.

Q. That would remain the same?

A. Yes, sir.

Q. Can you tell, Mr. Liberman, by looking into the future what you would do with that plant, or what you would do with that operation five years hence, assuming that the available timber supply diminishes to 10, 12 million feet per year?

A. That is quite a question. It is quite a problem that frankly I don't know now, I couldn't answer intelligently.

Q. In other words, do I understand you to mean that now you could not determine what you would do at the end of five years when the available timber drops to the amount I have indicated?

A. That is correct. We would have to consider scrapping the mill, build another new one, completely new mill to be competitive, to get down to efficient costs.

(Testimony of Maurice Liberman.)

Q. Had you finished? A. Yes, sir. [660]

Q. Tell us generally, Mr. Liberman, what the mill and equipment was in Winslow when you acquired the Arizona Timber Company?

A. It was in run down condition.

Q. Did you have to make repairs to it to put it in condition to handle the operation as you wanted to handle the operation? A. Yes, sir.

Q. Without getting into the detail of each item, tell me some of the substantial repair items that you had to make? [661]

A. Well, we had to make a planing mill, the planing mill was in a very poor shape, the worst shape. We had to take out the planer and install another planer that we shipped from Albuquerque. The same thing with the trimmer, we had to take out the trimmer and put another trimmer that we had in Albuquerque. We had to revamp the chains in the planing mill, we had to revamp the blowing system to the burner.

Q. Now, I don't know what a blowing system is, tell me what that is with respect to the saw mill?

A. That's the system that sucks the sawdust and shavings into a burner.

Q. So it can be disposed of?

A. It's in the suction process to dispose of them. We had to repair the burners, the two burners that were a fire hazard and the insurance company practically told us—

(Testimony of Maurice Liberman.)

Mr. Romley: Now, just a moment.

Q. (By Mr. Moore): No, not what somebody told you, Mr. Liberman.

A. Well, we had to repair the burners. The rolling equipment we had to replace a lift truck and carrier, we had to make repairs in the saw mill. I can't remember——

Q. Approximately how much in dollars have you had to add—now, leave out rolling stock in this question.

Approximately how much in dollars have you had to add in the form of replacements and repairs to the mill since you [662] took it over?

Mr. Romley: We object, if your Honor pleases, not the best evidence, also those records are here available for examination.

Mr. Moore: Some of them are, some items, but the record of the exact cost of each item, I don't have those records.

The Court: Well, he may answer if he knows. If he knows personally what they are, he may answer.

A. Well, that will be a guess because I don't have the exact figures, but I would say somewhere——

Mr. Romley: Now, just a moment, I object to any guess.

Q. (By Mr. Moore): I don't want you to guess at it, Mr. Liberman, that's not good evidence. If you have information from which you personally

(Testimony of Maurice Liberman.)

know approximately how much is represented in dollars by those various things you have mentioned, that's what I want you to tell me, I don't want you to guess.

A. Well, let's add them, if my memory is correct. The planer, I would say the planer is worth twenty-five or thirty thousand dollars. The trimmer I would say is worth somewhere around ten or twelve thousand dollars. The repairs on the burner and the suction, blow pipe system I would guess—

Q. Not a guess, your best judgment from your information.

A. I would say five thousand dollars. What else did we [663] spend there?

Q. Have you had to put in a stacker?

A. Yes, we put in a stacker, a new stacker about thirty-five thousand dollars.

Q. Now, that's not a mobile unit?

A. No, sir, that's a fixed piece of equipment.

Q. And what is the function and purpose of the stacker?

A. That's to pile up the rough green lumber, put it on stacks for drying purposes.

Q. All right. Now, what other item did you think of?

A. The kilns, I'd say substantial expenses, I would say around six, seven thousand dollars. The power station we bought.

Q. Do you have any recollection as to the cost?

A. We bought the power station, I would say eight or nine thousand dollars. We put in a fence

(Testimony of Maurice Liberman.)

around somewhere between nine and ten thousand dollars. I mean there are many more items that I don't remember.

Q. Now, let me ask you about the kilns. Can you tell me what type of kilns are there or were there when you acquired it?

A. There is one wooden kiln, what I mean by wooden is the building is made out of wood.

Q. First for the record, Mr. Liberman, tell us what a kiln is? [664]

A. A kiln serves the purpose of artificially drying lumber through either steam or gas heat.

Q. By gas you mean dry heat?

A. Dry heat, that's right.

Q. Steam or dry heat? A. Yes.

Q. And is that a type of a building or structure in which is heated and the lumber is put in there to dry out? A. Yes.

Q. All right. Now, you say a wooden kiln, what—

A. One wooden kiln that was a very—practically obsolete, and in a terrible shape that we couldn't use. We had to make some immediate—immediately make some repairs so we could use it temporarily.

Q. Have you replaced that wooden kiln yet?

A. Not yet. We have proposals, quotations and are ready to, considering now to order a new kiln.

Q. And why are you considering the construction of a new kiln in the place of the wooden kiln we have talked about?

(Testimony of Maurice Liberman.)

A. Because the work that the kiln performs is not good. We are having—we ship this lumber to Albuquerque for our molding plant and we have claims and we produce mismanufactured moldings, produces on account of the defective drying.

Q. Now, is there another kiln up there besides the wooden? [665]

A. Yes, sir, there is a metal kiln.

Q. What is the condition of it?

A. The condition—this kiln has been built by a firm that was not specializing in kiln buildings and equipment, and that was their number one, if I am not mistaken, that was their number one job and they have—they didn't have enough experience and put it up in a way that it's not performing correctly. We had experts to try to improve it, so forth, but the amount of money that we have to spend for new equipment is considerable and we don't know what to do, to replace it or spend the money on the new equipment.

Q. Now, you said you had quotations, do you have that information or does one of the other gentlemen have that that I can get it from on the new kilns?

A. Yes, we have that information.

Q. I mean you personally or one of the other men has the amount?

A. I think Mr. Weinstein has it.

Q. All right, I will ask him about that then. We have had some discussion here, Mr. Liberman, about overrun and underrun. First let me ask you

(Testimony of Maurice Liberman.)

about your recollection of when you made the settlement with Mr. Gallagher for the stumpage on the timber that he had cut under the milling contract, did you make a check then to ascertain whether you had an overrun or an underrun on that timber?

A. Yes, sir. [666]

Q. And what was it first, overrun or underrun?

A. Underrun.

Q. Approximately how much?

Mr. Romley: Just a moment, I object to that, if your Honor pleases. May I inquire on voir dire?

The Court: Surely.

Mr. Romley: You say a computation was made at that time?

A. Yes, sir.

Mr. Romley: Was that a written computation?

A. Yes, sir.

Mr. Romley: Where is that writing?

Mr. Moore: I think it's in evidence, part of it is. I think you put it in, Mr. Romley. I believe it's attached.

Mr. Romley: You mean the one Gallagher produced?

Mr. Moore: Yes, I think that was shown on—

Mr. Romley: That's 18 or 19, I believe.

Mr. Moore: We have a schedule prepared that will cover it.

Mr. Romley: Well, then, I object to it, if your Honor pleases, if there is something in writing. I think you are referring to 19 for identification, Mr. Moore.

(Testimony of Maurice Liberman.)

Mr. Moore: It isn't shown on here, Mr. Romley. It has to be calculated from the total. [667]

Mr. Romley: I didn't think it was. Well, if there is a calculation, your Honor, I submit that's the best evidence and object to it on that ground.

Mr. Moore: I will withdraw that question in the sake of time.

Q. (By Mr. Moore): Now, Mr. Liberman, shortly after your meeting on September 20th, after you got home from your meeting on September 20th, that's the Winslow meeting, and after your telephone conversation with Mr. Jenkins on the 10th, and after these other telephone conversations other than the first two from New York to Mrs. Nagel you have mentioned, did you make notes as to the substance of what had been covered in those?

A. Yes, sir.

Q. And did you use those notes to refresh your recollection with respect to recalling the details of those conferences and conversations?

A. Yes, sir.

Q. And a substantial part of those notes have been furnished to counsel at his request, Mr. Romley?

A. Yes, sir.

Q. Will you tell me why you wanted Mrs. Nagel to come to New York on October 16th?

A. Well, I wanted her to come to New York to discuss with her what we were going to do with the—as far as the purchase is concerned: Are we

(Testimony of Maurice Liberman.)

going to buy it as a partnership; [668] are we going to buy it as a joint venture; are we going to—who is going to supply the money, the capital for inventories, working capital to take on the obligation to the Kaplans for the purchase price; what to do with the timber; how we were going to handle the matter of Duke City's timber; how we are going to handle the matter of Mrs. Nagel's timber, or the timber that we were—we would have bought together. I mean there were hundreds of questions that we have to discuss—had to discuss before we would have made the purchase.

Mr. Romley: Just a moment, will you read me that last, please?

(Whereupon, the portion of the last answer was read as follows: "I mean there were hundreds of questions that we have to discuss—had to discuss before we would have made the purchase.")

Q. (By Mr. Moore): Those matters that you have mentioned, had you discussed any of those or worked out any details whatever with Mrs. Nagel with respect to those questions?

A. No, sir.

Q. Now, do you have, Mr. Liberman—I believe it was in your briefcase here—the telephone bill which will show those calls from New York on the 16th?

A. Yes, sir.

Q. May I look in here to try to find it?

A. Yes, sir. It's in an envelope. [669]

(Testimony of Maurice Liberman.)

Q. In this brown envelope?

A. No, sir, it's a white envelope on the bottom.

Q. This is it? A. That's right.

Q. Pick out the one here, Mr. Liberman, that shows the October 16th calls?

A. There are two here.

Q. No, just so I have got the right one to mark as an exhibit.

A. Yes, this—these three, Winslow.

Mr. Romley: No objection, your Honor, to this exhibit—you haven't marked it yet?

Mr. Moore: No.

The Court: It may be received.

(Defendants' Exhibit G was received in evidence.)

Q. (By Mr. Moore): Mr. Liberman, I hand you Defendants' Exhibit G in evidence, even though it's already in evidence tell us briefly what that is? I had not identified it with you.

A. This is a bill from the telephone company to the Duke City Lumber Company.

Q. On long distance calls?

A. Long distance calls and shows the credit plan. In other words, my credit card calls, all of my calls.

Q. The penciled number? [670]

A. That's my—

Q. 1831?

A. That's my identification, the identification of my number on my credit card.

Q. Now, where it appears WNS, what does that mean?

(Testimony of Maurice Liberman.)

A. That's the calls to Winslow.

Q. And where there is New York with no indication, what does that mean?

A. That's a call to the home base, if I may say so, to Albuquerque.

Q. And on the bottom page it starts out October 12th, and then October 16th?

A. That's right, that's a call to Albuquerque.

Q. The first one on the 16th?

A. That's correct.

Q. The next one listed is Winslow?

A. Yes, sir.

Q. The next one listed is Winslow?

A. Yes, sir.

Q. And then there are three Winslow?

A. No, two.

Q. Another indication here?

A. To here.

Q. And these others then are Albuquerque?

A. All Albuquerque. [671]

Q. Are those the bills for the calls that you have told us about that you made for Winslow to Mrs. Nagel on the 16th of October? A. Yes, sir.

Q. And do those also, those other calls to Albuquerque indicate some of the calls you had to your brother, Joe Grevey in Albuquerque on the 16th?

A. Yes, sir. [672]

(Defendants' Exhibit H marked for identification.)

(Testimony of Maurice Liberman.)

Q. (By Mr. Moore): Mr. Liberman, I hand you what has been marked Defendants' Exhibit H and ask you what that is, without telling me what is in it, just what is it?

A. This is the letter I have written to the Nagels.

Q. On what date? A. September 24th.

Q. Is that the letter that you referred to you never got back from them signed?

A. Yes, sir.

Q. Is this a correct and exact copy bearing your initials or signature on that letter?

A. Yes, sir.

Mr. Moore: We offer Defendants' Exhibit H in evidence.

Mr. Romley: No objection.

The Court: It may be received.

(Defendants' Exhibit H marked in evidence.)

Mr. Moore: You may examine.

Cross Examination

Q. (By Mr. Romley): Mr. Liberman, before I get back to the beginning, sir, I would like to ask you about one or two points you testified on [673] Friday.

Do you recall your testimony regarding a conference in Mr. or Judge Johnson's office in Albuquerque attended by you and Judge Johnson, by Jim Cox, Bob Jenkins and Mrs. Nagel?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. I think you said on Friday that was on January 6th, 1959, is that right? A. Yes, sir.

Q. And you had other conferences at Judge Johnson's office at which Jim Cox and Bob Jenkins were present? A. Yes, sir.

Q. But that is the only one at which Mrs. Nagel was present, is that right, sir?

A. Yes, sir.

Q. And that is January 6th, 1959?

A. Yes, sir.

Q. Do you recall when your deposition was taken you referred to a conference attended by Mrs. Nagel in March of 1959? A. Yes, sir.

Q. You were mistaken when you said it was March, it actually was in January, is that right, sir? A. Yes, sir.

Q. Now, with reference to that conversation or that conference in Judge Johnson's office, I believe that Mr. Moore asked you these questions and you made these answers, [674] reading, Mr. Moore, from 651:

"Question: What was said, if anything, by Mrs. Nagel or Mr. Jenkins with respect to being ready, willing and able to perform and they demanded the right to exercise their option and buy into this thing at the January 6th meeting?

"Answer: Nothing.

"Question: After they read the contract did Mrs. Nagel make any comment to you about the contract or transaction that you recall?

(Testimony of Maurice Liberman.)

“Answer: Yes.

“Question: What was it?

“Answer: She said it was a good contract.”

Was that the entire conversation with regard to being ready, willing and able to perform the contract and wanting to exercise it, insofar as Bob Jenkins and Mrs. Nagel were concerned?

A. Yes, sir.

Q. Do you recall when your deposition was taken, when I asked you substantially the same questions, and I am reading, Mr. Moore, from 296 of the deposition, beginning line 12 and ending line 25. We had better go back to the earlier one, page 164, line 2.

Mr. Moore: That is a different volume.

Mr. Romley: Page 164, line 2 to 164 line 14:

“Question: So then just while we are on this subject, [675] sir, in March of this year the Nagel Company gave you notice it intended to exercise the option granted in the letter of September 23, 1958, that is true, isn't it?

“Answer: I don't know if it was a formal notice.

“Question: The Company told you it was ready, willing and able to exercise the option in March of this year? “Answer: Yes.

“Question: You refused to allow it to exercise that option? “Answer: Yes.”

You made those answers to those questions, did you not?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Were they with relation to the meeting of January when Mrs. Nagel was present?

A. Yes, sir.

Q. Now, further than that, on page 296 of your deposition, commencing with line 12 and ending on line 25, do you remember these questions, with reference to the same meeting in January which you erroneously at that time said was March:

“Question: You don’t recall her saying: ‘Maurice, we are ready to go ahead, we want to buy in like we have the right to do under our agreement’?”

“Answer: I don’t.

“Question: You don’t remember that? [676]

“Answer: No.

“Question: Would you deny that?”

“Answer: No.

“Question: You wouldn’t deny it. In any event, at that time if she did make that proposition or make that statement to you, she wanted to go ahead, you would have refused her to go ahead?”

“Answer: Yes, sir.”

You were asked those questions, and did you make those answers?

A. Yes, sir.

Q. So on Friday you said that Mrs. Jenkins—or Mrs. Nagel and Bob Jenkins did not tell you they were ready, willing and able to perform?

A. Yes, sir.

Q. In your deposition you said exactly the contrary?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Both times you were sworn and under oath?

A. I didn't say the contrary.

Q. You didn't? Do you recall now, on another subject, with regard to your testimony here last Friday—and I am reading, Mr. Moore, from page 650 of the daily, commencing with line 4, to page 651, line 4. You started out with a long statement of what had transpired, and this again relates to the conference at which Mrs. Nagel was present [677] in Judge Johnson's office in January:

“Answer: I told them about my conversation with Mrs. Nagel, that I had no obligation as far as the September 23rd agreement. That I called her in New York, that I asked her to participate, that I gave her the terms, I gave her additional time in my last conversation, that she didn't wire me. She told me before I accepted the deal and committed myself, and I committed myself on what she told me during the first two conversations. I made my commitment on the basis because she told me she doesn't want to participate and she wasn't interested. So went ahead and made my commitments; and that I felt I have done everything so far as I was concerned to comply with our September 23rd agreement and I felt I had no obligation whatsoever.”

Then Mr. Moore asked you this question:

“Question: At that meeting when you recited the substance of what you told me with respect to your telephone conversations with Mrs. Nagel, did Mrs.

(Testimony of Maurice Liberman.)

Nagel deny that what you had said was covered in those telephone conversations with her?

“Answer: No, sir, most of our conversation was the question of interpretation of the agreement of September 23rd.

“Question: But you say you did relate in substance what you had said and what Mrs. Nagel had said in these [678] telephone conversations?

“Answer: That is correct.”

Then Mr. Moore asked you this question:

“Question: My question is, did she deny what you said was covered in those telephone conversations? “Answer: No, sir.”

Do you remember that testimony?

A. Yes, sir.

Q. Let me direct your attention, sir, to the deposition on this same subject, at page 293, line 2, to 293, line 22, same page, lines 2 to 22:

“Tell us what it was you said?

“Answer: Well, I told her that I called her in New York and submitted to her, gave her the price, submitted to her the terms of the tentative proposal we made and she declined to participate. As a consequence I felt our written agreement that we had was terminated.

“Question: Tell me what she said.

“Answer: Well, she said she didn't agree with it.

“Question: She denied your statements, in other words? “Answer: That's right.

“Question: She denied she had released you in any way, did she? “Answer: No.

(Testimony of Maurice Liberman.)

“Question: What did she say in that [679] regard?”

“Answer: Well, I don’t recall frankly exactly what the words were.

“Question: You do recall that she denied what you had said and claimed?”

“Answer: Yes, I would say so.”

Were you asked those questions and did you make those answers in your deposition?

A. Yes, sir.

Q. And they related to the same conversations, the same conference in Judge Johnson’s office on January 6th, 1959, did they not?

A. Yes, sir.

Q. Both times you were under oath?

A. Yes, sir.

Q. Let’s go back to the beginning, sir, of this matter. I think you said Friday that you had known the Nagel Company since about 1947, is that right, Mr. Liberman?

A. Yes, sir.

Q. At that time did you meet either Mr. Nagel or was it Mrs. Nagel?

A. Mr. Nagel.

Q. At that time he was operating the mill?

A. Yes, sir.

Q. Did you do any business with him?

A. Yes, I think so. [680]

Q. Purchase some lumber from him?

A. Yes, sir.

Q. Then sometime later I assume it was you met Mrs. Nagel?

(Testimony of Maurice Liberman.)

A. Quite awhile later, yes.

Q. Do you remember when it was, approximately?

A. I couldn't say, I don't remember.

Q. Was it after Mr. Nagel had his stroke and was incapacitated and she took over the operation of the mill?

A. Yes.

Q. Do you recall whether you met her prior to the time you negotiated for the Aztec timber?

A. Yes, sir.

Q. Those negotiations were in late 1955, if I remember correctly, is that right, sir?

A. No. Mrs. Nagel, beginning of '56.

Q. In the beginning of '56?

A. Yes.

Q. And the contract I think in evidence here or stipulated to was signed on May 21, 1956, that's right, is it not?

A. The Aztec Company.

Mr. Moore: You are talking about the Aztec purchase?

The Witness: Yes, sir.

Q. (By Mr. Romley): With reference to that contract, could you tell us how long you had known Mrs. Nagel at that time? [681]

A. I couldn't.

Q. Was it a year or two or five?

A. I would say at least two years.

Q. At least two years. Had you ever had any conversations with her relating to anything other than the purchase of lumber from the Nagel mill?

A. Not to my recollection.

(Testimony of Maurice Liberman.)

Q. After that contract of May 21, 1956, your Aztec purchase contract, did you have any conversations with Mrs. Nagel relating to anything other than purchase of lumber from her mill?

A. Milling.

Q. I assume you mean by that, Mr. Liberman, you talked to her about the possibility of her milling some of your Aztec timber, is that right?

A. Connected with it, yes. Something related to the milling.

Q. Was it in regard to manufacturing that timber into lumber? A. Yes, sir.

Q. Was that shortly after the contract was signed in May, 1956? A. I don't remember.

Q. Did you have just the one conference with her on that subject? [682]

A. I remember that meeting but I had other conversations by long distance and possibly even personal.

Q. With regard to the milling of your Aztec timber, or with regard to the purchase of lumber?

A. Both.

Q. Prior to September 18, 1958, had you ever had any discussions with Mrs. Nagel with regard to purchasing the Nagel Lumber & Timber Company? A. Not to my recollection.

Q. Or with regard to purchasing the Arizona Timber Company, the Gallagher properties?

A. Not to my recollection.

(Testimony of Maurice Liberman.)

Q. Do you remember, Mr. Liberman, approximately how long it was before September 18, 1956, that you had last talked to Mrs. Nagel on any subject? A. I don't remember.

Q. Was it a matter of days, weeks or months, or do you know, sir? A. I don't know.

Q. And the call on September 18 was one that you placed to her, not her to you, is that right?

A. I placed it to her.

Q. Because you knew at that time that she had this first refusal agreement with the Arizona Timber Company, isn't that right? [683]

A. I didn't hear you, Mr. Romley.

Q. I say you placed your call to her on September 18, 1958, because you knew of the first refusal agreement that she had with Gallagher?

A. No, sir.

Q. You did know about that first refusal agreement on September 18th, did you not?

Mr. Moore: We object to that as argumentative. That first question was not whether he knew, it was the reason for the September 18 call.

Mr. Romley: An entirely new question.

The Court: He may answer.

A. Would you repeat the question.

Q. (By Mr. Romley): Yes. You knew, did you not, Mr. Liberman, on September 18, 1958, that Mrs. Nagel or her company had a right of first refusal with Gallagher? A. Yes.

(Testimony of Maurice Liberman.)

Mr. Moore: We object to that as calling for a legal conclusion. He may have known that somebody said that and the record showed that, but—

The Court: He may answer.

Q. (By Mr. Romley): You did know that?

A. Yes, sir.

Q. How long had you known it at that [684] time?

A. Since September 12th or 11th.

Q. Let us go back a bit, sir. The first time you ever had any negotiations with regard to the purchase of the Gallagher properties were made with Tom Gallagher, isn't that right, sir?

A. Yes, sir.

Q. And that was the first time I am speaking of, sir, on September 10, 1958.

A. Please be more specific.

Q. The first time you ever had any negotiations with regard to the purchase of the Gallagher property was on September 10, 1958, when you met in Tom Gallagher's office at Albuquerque, is that right, sir?

A. No, sir.

Q. Did you ever talk to Tom Gallagher or anyone else with regard to the purchase of the Gallagher properties prior to September 10, 1958?

A. I have talked with Gallagher about the Gallagher properties, as you say, that included New Mexico and Arizona. That was why I asked you to be more specific.

(Testimony of Maurice Liberman.)

Q. When was that?

A. We had discussions about mergers and purchasing all the property since, I would say, June.

Q. Is this a correct statement, Mr. Liberman, that when you went to Mr. Gallagher's office on September 10, 1958, you [685] did so for the purpose of trying to purchase all of the properties owned by A. I. Kaplan and Tom Gallagher, both in Arizona and New Mexico insofar as the lumber industries are concerned, is that right, sir?

A. Yes, sir.

Q. And was that purchase you were seeking to negotiate one that you wanted for Duke City alone?

A. No, sir.

Q. Was it one that you wanted for Duke City and someone else?

A. Duke City and Gallagher, personally.

Q. Do I understand from your testimony, sir, that on September 10, 1958, when you went to see Mr. Gallagher that you did so for the purpose of trying to purchase all of the Gallagher properties in Arizona and New Mexico with Gallagher himself?

A. Yes, sir.

Q. As a fifty-fifty proposition?

A. Yes, sir.

Q. Mr. Gallagher told you he was not interested?

A. The 10th?

Q. Yes. A. Yes, sir.

Q. And then did the subject go to the purchase by Duke City of the Gallagher properties only—when I use the term [686] “Gallagher properties,”

(Testimony of Maurice Liberman.)

unless I otherwise indicate, I mean the Gallagher properties, Winslow mill and timber, do you understand me, sir? A. Yes.

Q. Then did your subject turn to the purchase of the Gallagher properties alone?

A. Yes, sir.

Q. Did you start negotiations at that time, on September 10 for the purchase of the Gallagher properties? A. Yes, sir.

Q. Were those the first serious negotiations of any kind with either Gallagher or Kaplan for the purchase of the Gallagher properties?

A. As far as Winslow, yes.

Q. Were you negotiating for the purchase of those Gallagher properties for Duke City alone?

A. Yes, sir.

Q. And by that you mean for the partnership consisting of you and your two brothers, Jack and Joe Grevey?

A. For our interest. We haven't specified whether Duke City, for our interest, the Liberman group.

Q. In any event, nobody outside the Liberman group was interested in that negotiation, is that right, sir? A. That is correct.

Q. In that conversation did Mr. Gallagher say to you that [687] he was willing to sell the Gallagher properties? A. Yes, sir.

Q. And you said, "Fine, let's see if we can work out a deal," or words to that effect, is that right?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Then you discussed various proposals and prices, I assume, is that right, sir?

A. Yes, sir.

Q. And Mr. Gallagher told you, "Maurice," or "Mr. Liberman," however he may have addressed you, in substance, "I will have to submit any proposal you and I make to Mrs. Nagel because she has a right of first refusal"?

A. No, sir.

Q. He didn't tell you that? A. No, sir.

Q. Did he say anything at that time, still speaking of September 10th, with regard to a right of first refusal? A. No, sir.

Q. Did you reach any kind of tentative or informal understanding with Mr. Gallagher as a result of that conference on the 10th?

A. Yes, sir.

Q. Anyone present besides you and Tom Gallagher? A. Yes.

Q. Who? [688] A. My brother Joe.

Q. Joe Grevey? A. Yes.

Q. Anyone else? A. No.

Q. This was on the 10th? A. Yes.

Q. September 10th? A. That is right.

Q. You were talking to him and negotiating with him on September 10th for the purchase of the Winslow mill and the timber behind it, isn't that right? A. Yes, sir.

Q. As a matter of fact, the mill without the standing timber has but little value, isn't that right, sir? A. No, sir.

(Testimony of Maurice Liberman.)

Q. The value of the mill is largely dependent on what timber there is behind it that it can control, isn't that right, sir?

A. Not as far as we were concerned.

Q. I will come back to that later.

The Court: We will take the morning recess at this time.

(Recess.) [689]

After recess:

Q. (By Mr. Romley): Mr. Liberman, is it correct to say that a mill or plant is dependent, so far as its economic or profitable operation is concerned, upon having timber available from a working circle? A. Yes, sir.

Q. And a mill or plant has greater value if it has standing timber or a working circle to supply it? A. Yes, sir.

Q. And the only source of supply for both the Arizona Timber mill and the Duke City—and the Nagel mill in September, 1958, was the Forest Service timber and the Aztec timber in the Chevalon working circle in the Sitgreaves National Forest, is that right, sir? A. Yes, sir.

Q. Now, when you were talking with Tom Gallagher on September the 10th, and he told you, as you have testified, that he wouldn't, in effect, entertain any proposals for all of the Gallagher and Kaplan properties in Arizona and New Mexico, did he suggest to you that he would be willing to sell you just the Winslow plant?

(Testimony of Maurice Liberman.)

A. The plant and the timber.

Q. Well, didn't you say that he would be willing to sell you the Winslow plant?

A. He said he wanted to sell the plant and wanted to [690] liquidate or terminate our pooling agreement.

Q. Well, did he say to you that he would be willing to sell you just the Winslow plant?

A. No, sir, we—he said he was willing to sell the plant and to liquidate, terminate the pooling agreement.

Q. Well, when he said he was willing to sell you the Winslow plant you understood him as meaning the plant and the timber, isn't that right, sir.

A. No, sir.

Q. Let me direct your attention, sir, to your deposition on December 5th of last year, page 75 commencing at line 20, your answer:

“Answer: Mr. Gallagher told me that he changed his mind, that he didn't want to continue the negotiations as far as the merger and acquisition of it, of all the Gallagher properties. And then he suggested to me that he would be willing to sell me just the Winslow plant.”

Do you remember that statement on your part?

A. Yes, sir.

Q. And do you remember this question and answer immediately following:

“Question: Meaning what?

“Answer: Meaning the plant and timber.”

(Testimony of Maurice Liberman.)

A. Yes, sir.

Q. You made that answer to that statement?

A. Yes, sir. [691]

Q. When referring to the term "Winslow plant" that Tom Gallagher used to you, you meant the plant and the timber, didn't you?

Mr. Moore: We object to that as calling for a conclusion as to what Tom Gallagher meant.

The Court: May I have the question.

(Whereupon, the pending question was read by the reporter.)

The Court: He may answer.

Mr. Moore: "You," I thought he said "he."

A. No, sir, we had an agreement, a written document, a proposition that he made to me which defined correct exactly what "plant" meant and what "timber" meant and that was the proposition that we discussed, and that's what we signed.

Q. But you did testify under oath when I asked you what was meant by the use of the word "Winslow plant" that it meant plant and timber, didn't you? A. Yes.

Q. And do you recall on page 74, commencing at line 9:

"Question: Now, what was your response when Mr. Gallagher made that suggestion or statement?

"Answer: Well, my response was that that changed completely the picture and that I would be willing to buy just the Arizona plant. [692]

(Testimony of Maurice Liberman.)

“Question: The Arizona plant and timber as you said a while ago?”

“Answer: That’s right.

Was that your testimony?”

A. Yes, sir.

Q. And on line 21, page 74:

“Question: Just now when you said ‘Arizona plant,’ you meant Arizona plant and timber?” and you answered: “That’s correct.”

Was that your testimony, sir?”

A. Yes, sir.

Q. So throughout this entire proceeding in your dealings with Mrs. Nagel, when you spoke of the Winslow plant you meant the plant and the timber, did you not? A. No, sir.

Mr. Moore: Why don’t you go ahead and read the last question at the page 74 and the answer on page 75 so we will have the whole picture.

Mr. Romley: I think Mr. Moore can do that, your Honor. May I proceed or shall I comply with his request?

The Court: No, you may proceed.

Mr. Romley: He did testify both ways.

Q. (By Mr. Romley): Then you left Tom’s office on the 10th of September and he was to write up some sort of an agreement along the lines you had discussed, is that right? [693]

A. Yes, sir.

Q. And he did send you an agreement on the next day, September 11th? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And you read that over carefully, did you not? A. Yes, sir.

Q. Did you discuss that with Judge Johnson?

A. Yes, sir.

Q. And it consisted of several pages type-written? A. Yes, sir.

Q. Did you make any changes on that?

A. Yes, sir.

Q. Several of them? A. Yes, sir.

Q. You made those yourself and in your handwriting? A. Yes, sir.

Q. And you noticed in that original draft, I believe it was dated September 11th, was it not?

A. Yes, sir.

Q. That there was reference to the first refusal agreement that Mrs. Nagel had, the right of first refusal, is that right? A. Yes, sir.

Q. Had the matter of first refusal ever been mentioned or did you have any knowledge of it before September 11th? A. No, sir. [694]

Q. But you did learn about it on that day?

A. Yes, sir.

Q. And you made changes and returned the agreement for Tom Gallagher to type in final form?

A. No, sir.

Q. Did you send it to him? A. No, sir.

Q. The original one, September 11th?

A. No, sir.

Q. Did you take it to him yourself?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. That was on the 12th of September?

A. Yes, sir.

Q. And you made no suggestion or change on the original draft with regard to this first refusal agreement, did you? A. No, sir.

Q. You didn't question it at all, did you?

A. When?

Q. On this original document dated September 11th? A. No, sir.

Q. And had you talked with Tom Gallagher between the end of your conference on the 10th of September and the beginning of the conference on the 12th when you went and took with you the original draft?

A. Let's see, I picked up the draft the 11th, in the morning. [695]

Q. Did you talk to Tom Gallagher on the morning of the 11th?

A. I don't recollect if I talked to him, I think I picked up the proposal the 11th.

Q. And then the first talk that you remember having with him after the 10th was when you went to his office on the 12th with the original draft and your penciled notations on it, is that right, sir?

A. Yes, sir.

Q. At that time did you say, "Mr. Gallagher, I notice here the Nagel Company has a right of first refusal"? A. No, sir.

Q. Did you make any comment at all about that?

A. Later in the day.

(Testimony of Maurice Liberman.)

Q. What did you say on that subject later in the day?

A. Well, I talked to Jack Kaplan.

Q. Was that over long distance telephone?

A. Yes, sir.

Q. From Tom's office? A. Yes, sir.

Q. Who was present other than Gallagher and yourself? A. My brother, Joe.

Q. Just the three of you?

A. Yes, sir. [696]

Q. Now, did you call Kaplan, Jack Kaplan, or did Mr. Gallagher, do you remember?

A. Mr. Gallagher.

Q. And did you talk to him on the phone also?

A. Yes, sir.

Q. And at that time did this question of first refusal come up? A. Yes, sir.

Q. How did it come up, did you mention it?

A. Gallagher mentioned it to Jack Kaplan over the phone.

Q. He said in substance: "We have a proposal here from Maurice, and it is subject to the right of first refusal by the Nagel Company or by Mrs. Nagel," or words to that effect, isn't that right?

A. Something to that effect.

Q. And were you listening in on the—were you on an extension or just in the room with Tom holding the receiver to his ear?

A. I think Tom was holding the receiver.

Q. You don't know what Jack Kaplan said in response? A. No.

(Testimony of Maurice Liberman.)

Q. Now, you took the receiver later and talked to Jack Kaplan? A. Yes, sir.

Q. Did you speak to him or mention to him in any way this [697] right of first refusal?

A. He talked to me about it.

Q. He told you that Mrs. Nagel had a right of first refusal? A. No, sir.

Q. Is that the only time you talked to Jack Kaplan on that day, on the 12th?

A. No, sir.

Q. When did you talk to him again on the 12th?

A. I talked to Jack Kaplan earlier, before I came to see Tom.

Q. I see. Now, after talking to Jack Kaplan did you have any further discussion with regard to this purchase or contemplated purchase with Tom Gallagher? A. No, sir.

Q. After talking to Jack Kaplan did you get up and walk away? A. No.

Q. Well, what happened?

A. Tom Gallagher dictated the final agreement.

Q. That was done in your presence?

A. Yes, sir.

Q. After the talk to Jack Kaplan?

A. That's correct.

Q. And after the talk to Jack Kaplan there was dictated [698] in your presence this statement that appears in the exhibit in evidence dated September 12th, 1958, in which reference is made to the Nagel Company's right of first refusal, isn't that right?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. When that was dictated in your presence, did you stop Tom and say, "Wait a minute, Tom, what's this first refusal all about?" or anything to that effect? A. No, sir.

Q. Did you make any comment at all while Tom was dictating or after he had finished dictating with regard to this right of first refusal?

A. I didn't make comments, Tom made some comments.

Q. You mean comments that did not go into the letter itself? A. I didn't hear you, sir.

Q. You mean comments that did not go into the letter itself?

A. Comments to Jack Kaplan when they talked over the phone.

Q. Well, this was on the 12th, you say?

A. Yes, sir.

Q. Did Tom tell you at that time that your proposal was subject to the right of first refusal by the Nagel Company?

A. He has written it in the proposal. [699]

Q. Did Tom Gallagher say to you at any time, in effect that the proposal which he had discussed with you was subject to the right of first refusal by the Nagel Company?

A. Would you please repeat the question?

Q. Did Tom Gallagher tell you at any time that the proposal he had discussed with you on September 10th was subject to the right of first refusal by the Nagel Company?

(Testimony of Maurice Liberman.)

A. He has written it in the proposal.

Q. No, I'm asking if he told you that.

A. No, sir.

Q. On page 85 of your deposition commencing at line 25, and continuing over to the next page, line 5:

“Question: It was Tom Gallagher then who told you in effect,—” I see it was “in this writing”—it was in the writing that he told you it was subject to the right of first refusal, is that right, sir?

A. Yes.

Q. Now, the letter was dictated in its final form then in your presence, is that right?

A. Yes, sir.

Q. And you didn't wait for it to be typed, did you, Mr. Liberman? A. No, sir.

Q. You went on back to your office and it was delivered to you later that day, was it? [700]

A. Yes, sir.

Q. And you sent your check?

A. I signed the letter and signed the check and sent it over.

Q. Now, when you signed that letter of September 12th, you knew, did you not, at that time that the proposal that was outlined therein for the purchase of the Gallagher properties was subject to a right of first refusal by the Nagel Company?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And you knew then, did you not, that something would have to be done with regard to that first refusal? A. Yes, sir.

Q. Something either by you or Tom Gallagher?

A. By Tom Gallagher.

Q. Had you discussed that and did he say that he would take care of that matter?

A. He discussed it with Jack Kaplan.

Q. In your presence over this long distance telephone, is that right? A. Yes.

Q. And he said he would see Mrs. Nagel?

A. He said that he would take care of it.

Q. Now, I believe your testimony on Friday was that you had no further conversation with Tom Gallagher direct between the end of that conference on September 12th and either the [701] 8th or 9th of October. I believe that's correct, is it not?

A. The 8th of October.

Q. The 8th of October, and that you received a call from Tom Cavanaugh who at that time was an employee of the Arizona Timber Company advising you that Mr. Gallagher instructed him to inform you that the deal was off, isn't that right?

A. Yes, sir.

Q. Now, you tried to find out why and Cavanaugh just said, "That's all Tom told me," or words to that effect? A. Yes, sir.

Q. So you immediately became concerned and wondered why, didn't you? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And you felt then that perhaps Mrs. Nagel had bought the plant because she had the right of first refusal, did you not? A. Yes, sir.

Q. So you called Mrs. Nagel? A. Yes, sir.

Q. And asked her if she had bought the plant?

A. Yes, sir.

Q. She said, "No." A. Yes, sir.

Q. Is that right? A. That's correct. [702]

Q. And up to that time it had been many days or weeks or months before you had talked to Mrs. Nagel. That's true, isn't it? A. Yes, sir.

Q. Would you say that you knew each other well at that time?

A. Well, no, I wouldn't say that.

Q. Certainly you didn't know—you didn't each know one another to the extent that you would just talk of many details regarding the transaction on the phone. That's true, isn't it?

A. I don't understand your question.

Q. Well, I will withdraw it, perhaps it's a bad question, anyway. After she told you that she hadn't bought the plant you say that she made some mention of coming to Albuquerque? A. Yes, sir.

Q. You offered to go see her? A. Yes, sir.

Q. And you chartered a plane and did go there on September 20th on a Saturday?

A. Yes, sir.

Q. When you went there on September 20th you still wanted to buy the plant, did you not, the plant and timber? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And you wanted to buy it for yourself and your brothers [703] alone, for Duke City in other words? A. Yes, sir.

Q. And when you went to Winslow on the 20th you knew that Mrs. Nagel also was interested and wanted to buy the plant and timber?

A. No, sir.

Q. Hadn't she told you she wanted to buy it?

A. She told me that she had—that she was negotiating.

Q. Did she tell you that she wanted to buy it?

A. She told me she wanted to buy it, but she didn't have the money.

Q. And on September 18th, over long distance telephone she told you she wanted to buy it?

A. She told me she wanted to buy it, she didn't have the financing.

Q. Well, then, as far as you were concerned she was out of the picture at that time, is that right? A. That's what she told me.

Q. Why did you go to Winslow on the 20th?

A. Because she asked me, she wanted to see me.

Q. Did she tell you what she wanted to see you about? A. No, sir.

Q. She just says, "Maurice, I'd like to talk to you," and you said, "All right, I'll come over." Is that right? A. That's correct. [704]

Q. And you hadn't the slightest idea what she wanted to talk to you about, is that right?

A. She told me she wanted to talk to me about the deal.

(Testimony of Maurice Liberman.)

Q. When you went over there did you have in mind probably the two of you, you and Nagels would buy the plant and timber together?

A. No, sir.

Q. But you did talk about that when you got there, didn't you? A. Later.

Q. When you got there you had some discussion about the proposal that Tom had made to Mrs. Nagel?

A. Mrs. Nagel told me about the proposal she got from Gallagher.

Q. She told you she had discussed—or Tom had offered to sell her the plant and timber on this basis: \$500,000 cash for the equipment and the mill and nineteen forty-five a thousand for the timber, the Aztec timber, isn't that right?

A. Yes, sir.

Q. And the Forest Service timber on the basis of the original contract price with the Forest Service?

A. I don't remember about the Forest Service.

Q. Well, was it your impression that she was to pay nineteen forty-five under this proposal for all timber, Aztec and Forest Service alike? [705]

A. No, all I recollect that she mentioned nineteen forty-five for the Aztec timber.

Q. The Forest Service timber was at a lesser rate, wasn't it? A. Yes, sir.

Q. And she said the proposal contemplated paying cash? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. You told her you had a proposal from Tom yourself, didn't you? A. Yes, sir.

Q. And you said, "He offered to sell it to me for \$500,000 and \$17 on the Aztec"? A. Yes, sir.

Q. Now, as far as your proposal was concerned the Aztec was 17 and the Forest Service was at the regular contract price with the Government, wasn't it? A. Yes, sir.

Q. You didn't tell Mrs. Nagel that you were going to buy it on credit, did you?

A. Yes, sir.

Q. Did you tell her how much you were going to pay down? A. It was all credit.

Q. Did you tell her how much you were going to pay down? A. No, sir.

Q. Did you tell her how or what credit terms you were [706] going to buy it or it had been offered to you?

A. I told her about credit, I'm not sure if I told her how the payments were going to be.

Q. Did you ask her if she had a right of first refusal? A. No, sir.

Q. You still believed on that day that she did have that right, didn't you? A. Yes, sir.

Q. Why didn't you tell her—strike that, please. I believe it's your testimony she said she wanted to buy it but didn't have the money?

A. That's right.

(Testimony of Maurice Liberman.)

Q. Why didn't you tell her then, "Well, now, this proposal that Tom made to me I can buy it with nothing down and I have got five years to pay off the plant and equipment and three years to pay off the timber"? Why didn't you tell her that, Mr. Liberman?

A. I told her that I had credit terms and it's possible that I told her the terms too, I don't remember about how the payments were to be made.

Q. Did you tell her you could buy it for \$100,000 less than she could? A. No, sir.

Q. Did you have any discussion with her as to the future operation of the plant, if it should be acquired? [707] A. No, sir.

Q. You did talk about the two of you purchasing the mill together, didn't you? A. Yes, sir.

Q. Did you talk about what you were going to do if you did buy it? A. No, sir.

Q. You say Mrs. Nagel had some papers, some data there that you spoke about?

A. That's right.

Q. Did you discuss the amount of timber that was available? A. No, sir.

Q. Did you discuss in any way the amount of timber that was uncut under existing Forest Service contracts? A. No, sir.

Q. Or the amount of timber that was available to the Arizona Timber Company under the Aztec contract that it had? A. No, sir.

(Testimony of Maurice Liberman.)

Q. Did you tell her that you owed Duke City for some timber—or you owed Gallagher for some timber, Aztec timber? A. No, sir.

Q. Did you discuss what timber might be available in the future? A. To some extent, yes.

Q. To the extent that you were trying to see, both of you, [708] where the timber would come from that would be milled in the Gallagher mill if the two of you should buy it, isn't that right?

A. No, sir.

Q. To what extent did you discuss the future timber?

A. Well, I mentioned in that connection that I expected that if I would buy the mill myself, Duke City would buy the mill, we will have timber up there for about seven years.

Q. And by that you meant timber under existing contracts and under future Forest Service contracts, is that right? A. Yes, sir.

Q. You felt there was enough timber under those two categories for at least seven years, didn't you?

A. Yes, sir.

Q. To operate at a capacity of close to thirty million feet a year for that period, is that right?

A. Yes, sir.

Q. Now, beyond the seven-year period did you also contemplate that there would be some other timber available from the Forest Service?

A. No, sir.

Q. Do you know what a management plan is, don't you? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Do you have a management plan relating to the forests in New Mexico which supply your other mills with timber? [709] A. Yes, sir.

Q. Have you seen those management plans?

A. No, sir.

Q. Have you seen the management plan relating to the Forest Service timber insofar as the Winslow area is concerned? A. No, sir.

Q. But you did know on September 20th that the Forest Service did make projections of timber to be made available for cutting at the Winslow mill? A. Not for the Winslow mill.

Q. Well, for the mills in Winslow, the two mills? A. For sale.

Q. Well, you knew, did you not, on September 20th that the only Forest Service timber that had ever been sold from the Chevalon working circle went to the two mills in Winslow, the Arizona Timber mill and the Nagel mill except for a little burnt timber that was taken out of there, isn't that right? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. Did you have any idea of where you were going to get your timber during this seven-year period after you had used up your Aztec timber and after the timber under existing Forest Service contracts had been used up?

A. From U. S. Forest Service sales. [710]

Q. From sales made by the Forest Service?

(Testimony of Maurice Liberman.)

A. That's right. [711]

Q. Now, sir, first when you arrived on the 20th of September at Mrs. Nagel's office, after your greetings, the suggestion was made that the mills, the two mills merge, is that right?

A. Yes, sir.

Q. Was that your suggestion?

A. Yes, sir.

Q. You said, "Mrs. Nagel, I think it would be a good idea if the Arizona Timber Mill and Duke City mill merge and operate together"?

Mr. Moore: The Arizona Timber and Duke City?

Mr. Romley: The Arizona Timber and Nagel mill.

A. If we were to buy the Arizona Timber, yes.

Q. (By Mr. Romley): She declined to go ahead with that proposition, didn't she?

A. I wouldn't say she declined.

Q. She told you she wasn't interested in making a merger of her mill at that time with the Arizona Timber mill, did she?

A. Not in your terms.

Q. In substance that is what she said?

A. No, sir.

Q. Did she agree to go ahead with the proposed merger?

A. We discussed it for quite some length, yes, and she liked the idea and we discussed it for some length. [712]

Q. But you did not both agree to proceed on that basis, did you? A. No, sir.

(Testimony of Maurice Liberman.)

Q. Although you had suggested she had said, "Maurice, I don't think in the final analysis we should merge," is that right?

A. No, she didn't say it in the terms you express, sir.

Q. Then when you did not agree on the merger, a proposal was made you buy the Arizona Timber plant and timber together, isn't that right?

A. We had some other discussion after the question of merger.

Q. After these other discussions then did you agree to proceed to purchase the plant and timber together? A. Yes, sir.

Q. And do you remember who initiated that discussion? A. No, I couldn't say.

Q. When she turned down your suggestion of a merger, you said, "Well, how about our buying this new plant together?"

A. I said at that time that I would buy the mill myself, I would keep the mill myself, and we kept on talking about Duke City operating the mill by themselves.

Q. Well, after a lot of talk then was it agreed before you left that conference and just before you left the conference, within twenty or thirty minutes or so, that Duke City and Nagel would buy the plant and timber together on a fifty-fifty basis?

Mr. Moore: We object to that as calling for a legal conclusion. He asked him was it agreed this

(Testimony of Maurice Liberman.)

was done. The evidence is clear the agreement is in the September 23rd letter, if there is an agreement.

The Court: He may answer.

A. We had an understanding as far as the plant is concerned.

Q. (By Mr. Romley): You told me—are you saying you had an understanding that Duke City and Nagel would buy the plant together on the fifty-fifty basis? A. Yes, sir.

Q. Also the timber.

A. We didn't discuss the timber.

Q. Didn't you tell me awhile ago that it was the plant and the timber that was discussed?

A. That Gallagher offered to me.

Q. Didn't you say that Nagel and Duke City were going to buy the plant and timber together?

A. No, sir.

Q. Nagel at that time already had a mill, didn't they? A. Yes, sir.

Q. A good mill? A. I don't know. [714]

Q. Comparable to the Arizona Timber mill?

A. Yes, sir.

Q. Do you know of any reason why it would buy a mill alone without the timber?

A. I don't know.

Q. You don't know. When you left the Nagel office on the 20th of September, was it with the understanding that you would write up a short

(Testimony of Maurice Liberman.)

agreement with regard to Duke City and Nagel purchasing or negotiating for the purchase of the Arizona Timber plant and timber?

A. Yes, sir—not the timber.

Q. What is that? A. Not the timber.

Q. Not the timber. Did you say to Mrs. Nagel when you left: “Mrs. Nagel, I will go back to Albuquerque and write up an agreement”?

A. It was the understanding I will go back and write up a letter.

Q. Where were you going to get the timber to mill in this Arizona Timber mill?

A. We had our Aztec timber.

Q. It was going to be milled through there?

A. We didn’t discuss it.

Q. Where was it going to be milled?

A. We hadn’t discussed it. [715]

Q. Can you answer that question, please? Where were you going to mill your Aztec timber?

A. Mr. Romley, we hadn’t discussed the matter.

Q. You had this discussion with Mrs. Nagel on the 20th in her office about buying the plant or the plant and the timber, didn’t you?

A. Yes, sir. Just the plant, Mr. Romley.

Q. That is what you say, it is the plant?

A. Yes, sir.

Q. Did you have any discussion what you were going to run through that plant in the way of timber? A. No, sir.

(Testimony of Maurice Liberman.)

Q. Did you have any intention to let the plant lie idle there or going to use it as a going concern?

A. I had no intentions at all. All we agreed was to buy, if we had a proposition, the two of us had a right to buy in fifty-fifty.

Q. If you bought in fifty-fifty on the plant alone, what were you going to do with the plant?

A. I didn't know, we hadn't discussed it yet.

Q. Did you have any idea at all?

A. We hadn't discussed it.

Q. Did you have any idea at all?

Mr. Moore: We object to what idea he had.

The Court: He may answer. [716]

Mr. Moore: Or what idea Mrs. Nagel had. It is what they discussed for the basis of the agreement.

The Court: He couldn't very well answer as to her idea; he can answer to his own.

Q. (By Mr. Romley): Did you have any idea what you were going to do with that plant if you bought it together?

A. We hadn't discussed it among ourselves what we were going to do with it.

Q. You are not answering my question, Mr. Liberman. Did you have any idea on September 20th, 1958, at the time you left Mrs. Nagel's office—

A. Yes, sir.

Q. —what you would do with the plant if you should buy it together?

Mr. Moore: I submit the witness did answer the question. He said he would have to discuss and

(Testimony of Maurice Liberman.)

work out what they would do with it, "if we bought it together." That was the idea that he had. That was his last answer.

The Court: He may answer this.

Q. (By Mr. Romley): Do you have the question in mind?

A. Would you repeat the question, please?
(The last question was read)

A. The idea was we had to get together and discuss all the questions pertaining to the purchase and how we would operate the mill, what we were going to do with it. [717]

Q. Did you say that in your discussion with Mrs. Nagel, "if we buy this together we have to sit down and talk about what we are going to do in the future."?

A. No, sir.

Q. That was something you had in your mind?

A. That's right.

Q. At that time you had a contract with Southwest Lumber Mills for 62 million five hundred five thousand feet of Aztec timber, didn't you?

A. Yes, sir.

Q. None of that had been cut, had it?

A. Yes, sir, none of it was cut.

Q. None of it was cut? A. No, sir.

Q. At that time you owed Gallagher for some 14 million feet of timber, isn't that right?

A. No, sir.

Q. Did you owe Gallagher any timber at all on September 20th, 1958?

(Testimony of Maurice Liberman.)

A. We used up from the pool 28 million feet of timber.

Q. Did you owe Gallagher any timber on September 20th, 1958?

Mr. Moore: We object to that, if your Honor please, as calling for a legal conclusion as to whether he owed timber. The pooling agreement is in evidence, the records [718] are in evidence as to what had been cut, who had got it and it is a very technical legal question as to who owed who what.

The Court: He may answer as to what he thought.

Q. (By Mr. Romley): Did you think you owed Tom Gallagher any timber at that time?

A. I felt I owed the pool. We used up from the pool 28 million feet.

Q. Did you feel you owed him any timber?

A. If we made the purchase, if the proposal would have been accepted and liquidated the pooling agreement I would have owed for 14 million feet.

Q. Now, Exhibit 1 is the letter of September 12th, 1958, addressed to you by Tom Gallagher and signed by you, is that right, sir? A. Yes, sir.

Q. In that letter it states, page 2, paragraph 2: "Your company owes Arizona Timber Company approximately 14 million feet of stumpage," doesn't it? A. Yes, sir.

Q. That statement was dictated in your presence, isn't that right? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. You did not make any objection to that statement when Tom dictated it, did you? [719]

A. I owed him for 14 million feet of timber.

Q. Did you make any objection to that statement when Tom Gallagher dictated it in your presence?
A. No, sir.

Q. Are you saying now that statement is not correct?

Mr. Moore: We object to that, if your Honor please, as calling for a legal conclusion.

The Court: He may answer.

Mr. Moore: We offered to show this operation and how they treated it and what was considered and going back to that time has been excluded.

The Court: No, this is cross examination. He may answer as to whether he is saying that is an incorrect statement now or not.

A. May I hear the question, please?

Q. (By Mr. Romley): Are you saying now, Mr. Liberman, this statement I just read to you from Exhibit 1 to the effect that your company owes Gallagher 14 million feet of timber is not correct?

A. It's correct.

Q. It is correct?

A. The statement in the letter is correct.

Q. Well, I know the statement is there, sir. I am trying to find out if you agree with that statement.
A. I signed the letter. [720]

Q. Then you do agree with the statement?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Then you did owe on September 12th, 1958, Gallagher for 14 million feet of timber, didn't you?

A. Yes, sir.

Q. Now, between that date and November 30th, when the computations were made, you had cut an additional 4 million odd feet, isn't that right and taken that much? A. Yes, sir.

Q. So as of November 30, 1958, you owed Gallagher for 18,852,000 feet of Pondersosa pine, is that right, sir?

Mr. Moore: We object to this, if your Honor please, as calling for a legal conclusion, because the letter was based upon the negotiations they had at that time and the ultimate situation was based upon the negotiations they had later. And to ask him whether he legally owed sometime after September——

The Court: No, I am not concerned as to whether he legally owed, but his own feeling about it. He may answer that. He is being asked whether, not to pass on the legal aspect of it, whether he felt he owed so many million feet at a certain date. That is the way he may answer it.

A. We liquidated the pooling agreement and I owed him for the timber I have received lumber for.

Q. (By Mr. Romley): Between September 12 and November 30, 1958, [721] you had cut and received timber for which Gallagher paid the stumpage, the difference between the approximately 14 million feet and this figure of 18,852,000, is that right?

(Testimony of Maurice Liberman.)

A. Would you state your question again?

Q. Between the dates of September 12th and November 30th you told us that you continued to cut timber? A. Yes, sir.

Q. You have told us on September 12th you owed Gallagher for 14 million feet of timber, is that right?

A. If the proposition of September 12th would have gotten in effect.

Q. If it did not get in effect you still owed him 14 million feet of timber, didn't you?

A. No, sir.

Q. Did you say in your proposal you owed him that? In this Exhibit 1 didn't you say you owed him 14 million feet? A. Yes.

Mr. Moore: We object to that as argumentative.

The Court: The exhibit speaks for itself.

Q. (By Mr. Romley): Now, I am not sure I have it clear in my mind, sir, so I will ask you. When you left Mrs. Nagel's office on September 20th, it was with the understanding that you would return to Albuquerque and you would write up a memorandum of the agreement, is that right? [722]

A. I will write up a written document which expresses what our understanding was.

Q. That was to be merely evidence of the understanding or agreement that you had made in her office, isn't that right?

Mr. Moore: We object to that, certainly calling for a legal conclusion as to whether it is evidence

(Testimony of Maurice Liberman.)

or what it is. The witness stated he would prepare an agreement in accordance with what they discussed.

The Court: He may answer as to what he understands he was to do or what the instrument was to be.

Q. (By Mr. Romley): Is that right, sir?

A. I was to prepare a letter to express what we agreed to, we discussed.

Q. Mr. Liberman, when you left Mrs. Nagel's office, you had already reached an agreement, isn't that right? A. We had an understanding.

Q. And the writing was merely evidence of the agreement, your letter of September 23rd, is that right?

Mr. Moore: That is a legal conclusion, we object to that.

The Court: The objection is sustained to that.

Q. (By Mr. Romley): With regard to the first part of that question, sir, at page 129 of your deposition, commencing at line 2: [723]

“Question: During the course of that conversation you reached an agreement?”

“Answer: This was the conclusion of our conference.

“Question: All right. In the course of that conference of September 20th in Mrs. Nagel's office you and Mrs. Nagel on behalf of your respective companies reached an oral agreement with regard to the purchase of the Gallagher properties, that is right, isn't it?”

(Testimony of Maurice Liberman.)

“Answer: With regard to an agreement to participate if either of us would get a proposal from Gallagher that we had a right to participate in the purchase of it.

“Question: Well, you did reach an agreement there on that day?

“Answer: That’s right.”

Did you make those answers to those questions?

A. Yes, sir.

Q. “Question: And it was at the conclusion you said, in effect, when I get back to Albuquerque I will write up that agreement in the form of a letter and one of you can sign it in my office.

“Answer: That is correct.”

Is that right, sir? A. Yes, sir.

Q. You already had an agreement then when you left, hadn’t you? [724]

Mr. Moore: We object to that as argumentative, if the Court please.

The Court: That has been asked and answered.

Q. (By Mr. Romley): At that time— I am still speaking of near the conference in Mrs. Nagel’s office on the 20th—you had already received some two days before your deal was off, hadn’t you?

A. Yes, sir.

Q. Then you didn’t consider at that time, Mr. Liberman, that there was still any proposal pending between you and Tom Gallagher?

A. I didn’t hear you.

(Testimony of Maurice Liberman.)

Q. I say on September 20th in Mrs. Nagel's office, you didn't consider there was a proposal pending with Tom Gallagher?

A. No. I received a phone call from Mr. Cavanaugh telling me that the deal was off.

Q. You felt there would have to be a completely new proposal initiated and carried on to its conclusion, is that right?

A. You are asking what I felt?

Q. Yes, sir.

A. I felt in my mind I still had the idea I can renew the conversations that I had with Gallagher and also the conversations with Mr. Kaplan. [725]

Q. I would like to get a more direct answer if I can to this question, sir. Did you feel at that time there would have to be a completely new proposal initiated and carried on to its conclusion?

A. I can't answer your question with a yes or no.

Q. Let's see if you were able to in the deposition, sir. Page 134—page 135:

Mr. Moore: Which page?

Mr. Romley: 135, lines 3 to 8:

“Question: All right, you felt that there would have to be a completely new proposal initiated and carried on to its conclusion, is that right?”

You said, “Well, all—

“Question: Just answer me, please.

“Answer: That's right.”

(Testimony of Maurice Liberman.)

Mr. Moore: I submit, if the Court please——

Mr. Romley: Let me finish, please.

Mr. Moore: Excuse me.

Q. (By Mr. Romley): Did you make that answer to that question? A. Yes, sir.

Mr. Moore: I submit, if the Court please, and move to strike that from the record, that is not impeachment, because the record itself shows the witness was not permitted to answer the question that was asked. [726]

Mr. Romley: I submit the record shows he was, your Honor, and he did answer it directly.

The Court: It may stand.

Q. (By Mr. Romley): When you left there on the 20th of September, you were going to see Mr. Gallagher to see if you could renew your conversation and get a new proposal from him, isn't that right, sir? A. No, sir.

Q. Let's look at page 134 of your deposition. Line 17, 134:

“Answer: I was to see Gallagher to see if I could renew our conversations and get a new proposal from him.”

Did you make that statement? A. Yes, sir.

Q. Mr. Liberman, when you left that conference on September 20th, did you know that the Nagel company was not going to negotiate at that particular time any further? A. Yes, sir.

Q. Was it agreed or understood among you that the Nagel company would remain in the background and allow you alone to negotiate with Tom?

(Testimony of Maurice Liberman.)

A. They told me when we started the conversation that they are not going to buy it.

Q. That isn't my question, sir. I am trying to find out if it was agreed or understood between you they would remain [727] in the background and that you alone would carry on negotiations with Tom for the purchase of the plant and timber?

A. For the plant, yes.

Q. It was agreed then and understood between you and Mrs. Nagel and Bob Jenkins that you would negotiate alone with Tom for the purchase of the plant, is that right?

A. That I would try to renew my conversations with him.

Q. Your conversations looking toward obtaining a new proposal for the purchase of the plant, is that right? A. Yes, sir.

Q. And if you succeeded in doing that it was to be for the joint benefit of yourself or your company and the Nagel Company, isn't that right?

A. We had the right to participate in the purchase.

Q. And the right was for both companies, is that right? A. Yes, sir.

Q. You knew that any negotiations to be carried on were to be done by you alone?

A. To get a proposal, yes.

Q. You felt you could do that at a better price than the Nagels could, is that right, sir?

A. No, sir.

(Testimony of Maurice Liberman.)

Q. Was there a reason why you alone were to carry on the negotiations?

A. Because they said, to start with they told us they [728] didn't have the money, they didn't want to buy it.

Q. Now, on September 20th, was there any discussion about the milling agreement you had with Tom? A. No, sir.

Q. Did you tell Mrs. Nagel and Bob what you were paying to get your timber milled with Tom Gallagher? A. Yes, sir.

Q. How did that come about if you didn't discuss the milling agreement?

A. It came about in our previous—somewhere during the conversations. I asked Mrs. Nagel why she was suspicious of us and wasn't—our relations weren't too friendly, I had that impression. So she enumerated several reasons for it, and one was that we purchased lumber from them and we made claims. The claims, we had reinspections and claims, we were right. I answered her questions. The second question, she told me why I bought some burned timber from Gallagher and didn't buy from her. I explained to her also that I wanted to buy some burned timber from her and somehow it didn't get to her because Gallagher was in between. He was relaying the message to Mrs. Nagel. Another question was that the milling contract that I made with Gallagher, I paid Gallagher \$3 and offered to her—this was with reference to the '56 conversation—and

(Testimony of Maurice Liberman.)

that I offered to her \$2. I told her, "I offered to you at \$2, you didn't have the equipment [729] to handle it." And our conversation ended in a negative form. And that was all that was mentioned. [730]

Q. Did you tell her that you were paying Tom three dollars a thousand for profit, \$75,000 a year for general administrative expense and all costs of milling your timber and \$4.33 a thousand for depreciation? A. No, sir.

Q. Was that mentioned at all in your presence?

A. No, sir.

Q. Did you say to Mrs. Nagel or to Bob Jenkins: "Now if we buy this plant together we are going to terminate this pooling agreement"?

A. No, sir.

Q. Was it your intention then that if the pooling agreement were not terminated that the timber which is the subject of that pooling agreement would be milled through this Arizona Timber plant?

A. I don't understand your question, Mr. Romney.

Q. Was it your intention, Mr. Liberman, on September 20th, 1958, that the timber involved in the pooling agreement would be milled through the Arizona Timber plant?

Mr. Moore: We object to that, if your Honor please, because the witness has heretofore answered many times that there was no agreement or discussion with reference to the operation of this mill or what timber would be used or how it would be

(Testimony of Maurice Liberman.)

acquired, and the multitude of things that would be necessary to work out an arrangement for a continued operation. [731]

The Court: No, he may state as to what his intention was, if he had one.

A. May I hear the question?

(Whereupon, the pending question was read by the reporter.)

A. No, sir.

Q. (By Mr. Romley): Where were you going to mill it?

A. We haven't—we haven't—if we were to purchase, if we had to make a purchase, if we had a proposition, if we made a purchase we had to discuss with Gallagher to liquidate the pooling agreement.

Q. What was your intention as to where you were going to mill it if you purchased the Arizona Timber plant?

A. Well, we had to make an agreement with Mrs. Nagel, discuss with Mrs. Nagel how we were going to handle the thing.

Q. You are not answering my question.

Mr. Moore: I submit he is answering it, your Honor.

The Court: It may stand.

Mr. Moore: I'm not objecting to the answer, but I am submitting that he has answered the question.

(Testimony of Maurice Liberman.)

Q. (By Mr. Romley): Well, your intention was that Mrs. Nagel and you would have the right to participate in the purchase on a 50-50 basis, isn't that right?

A. Yes, that we would write up an agreement that if we had a proposition, we had the right to participate in the [732] purchase on a 50-50 basis.

Q. 50-50 basis? A. That's right.

Q. And if you did participate on the 50-50 basis then your intention was that the Nagel Company and Duke City would operate it on a 50-50 basis, isn't that right, sir?

A. We haven't discussed my operation, we haven't discussed anything.

Q. Well, whether you have discussed it not, did you have any intention with regard—

A. No, sir, I didn't have any ideas. We had to get together and discuss and decide who was buying, how it's going to be bought, whose timber is going to be cut, where it's going to be cut. We had no discussion whatsoever, Mr. Romley.

Q. Well, did you have any intentions along those lines, sir?

Mr. Moore: We object to that as immaterial, your Honor. The witness has answered that.

The Court: Well, he may answer.

Q. (By Mr. Romley): Did you have any intentions along those lines?

A. I don't understand what you mean by intentions.

(Testimony of Maurice Liberman.)

Q. Let me rephrase it: Did you have any intentions in the event the two of you participated in the purchase as to what you were going to do with this timber? [733]

A. We had to sit down and work out the complete agreement, Mr. Romley. We didn't have anything, we haven't discussed anything.

The Court: No, it isn't a question of what "we had," but what did you, did you have any intentions as to what would happen, you, yourself, not "we." That's what counsel is asking you.

A. I didn't have any idea as to what we were going to discuss and how we were going to work out.

Q. (By Mr. Romley): I'm not asking you if you had any ideas what we are going to discuss, I'm asking you if you had any ideas where you were going to mill this timber or that you were going to mill this timber through the Arizona Timber plant?

Mr. Moore: I submit he has answered.

The Court: I think he has answered.

Q. (By Mr. Romley): Will you tell us just what you meant in the use of the term the 50-50 basis, that if you acquired this plant that you would operate it on a 50-50 basis?

A. We didn't discuss operation, Mr. Romley.

Q. Well, were you just going to own it on a 50-50 basis?

A. All we have agreed to is to purchase the mill on a 50-50 basis if we had the proposal.

(Testimony of Maurice Liberman.)

Q. At that time you contemplated that it would be operated as a going concern to make profits, didn't you? [734]

A. No, sir.

Q. Well, let me read your deposition again, sir, on page 352, line 2:

“Question: Now, Mr. Liberman, when you were talking about Mrs. Nagel and Bob Jenkins in the Nagel Lumber Company office on September 20th, 1958, you were contemplating at that time acquiring on a 50-50 basis, if a deal could be negotiated, a going business, isn't that right, a going business being that of the Arizona Timber or Arizona Timber and Lumber Company? “Answer: Yes.

“Question: And you were contemplating or presuming at least that that business would and could be operated by the new owners, you and the Nagels, at a profit, isn't that right?

“Answer: I expected it, yes.

“Question: You expected it to, both of you did?

“Answer: Yes.”

Did you make those answers to those questions?

A. Yes, sir.

Q. Now, in that same conference I believe you say there was some mention made of money and the inability, as you term it, of the Nagels to get enough money to buy the mill themselves, is that right, sir? A. Yes, sir.

Q. Now, did Mrs. Nagel or Bob Jenkins say, in the course of the conference, that if you did work

(Testimony of Maurice Liberman.)

out an arrangement for [735] the purchase of the Gallagher properties that they would need some time to raise their part of the money?

A. Will you restate the question?

Q. Did Mrs. Nagel or Bob Jenkins say, in the course of that conference, that if you did work out an arrangement for the purchase of the Gallagher properties that they would need some time to raise their part of the money?

A. They mentioned something that they—if we had a proposition and a purchase would have made by both of us, that they may need some money at that time. And I told them that I would help them.

Q. Did they say that they would need some time to raise their part of the money?

A. It's possible, I don't remember.

The Court: Pardon me, Mr. Romley, it's 12 o'clock. We will recess until 1:30.

(Whereupon, a recess was taken from approximately 12:00 o'clock noon until 1:30 o'clock p.m.) [736]

Afternoon Session

May 10, 1960, 1:30 O'Clock P.M.

MAURICE LIBERMAN

resumed the witness stand, and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Romley): Mr. Liberman, with regard to the April 30th day, I believe we were there when we recessed this morning. Did Mrs. Nagel or Bob Jenkins say in the course of the conference in her office on September 20th that if you did work out an arrangement for the purchase of the Gallagher property they would need some time to raise their part of the money?

A. Would you repeat the question?

(The last question was read.)

A. Yes.

Q. Did they tell you how long they needed?

A. No.

Q. Did you ask? A. No.

Q. Were you willing to go ahead on the deal even though you knew they would need some time to get their part of the money together?

A. Yes. [737]

Q. There was mention about liquidating inventories in the spring?

A. There was a mention in the conversation we had before about liquidating of inventories.

(Testimony of Maurice Liberman.)

Q. That is on September 20?

A. Yes, sir.

Q. You were willing to give them some time to get their money together?

A. Yes. I told them I would help them.

Q. Told them you would help them if they needed money?

A. If we had a purchase and we went into the purchase and they needed some help I was willing to give them some help.

Q. Was there a specific agreement as to how long they would have to raise the money?

Mr. Moore: We object to that as calling for a conclusion.

The Court: He may answer.

A. No, sir.

Q. (By Mr. Romley): Was it left then they could have a reasonable period of time to get their money together after the purchase was made?

A. No, sir.

Q. Let's go to your deposition, sir, page 140, lines 3 to 8: [738]

“Question: Was that left up in the air then that they could have a reasonable period of time to get their money together after the purchase was made?”

You asked that the question be read to you and it was and you answered:

“Answer: Yes.”

Did you make that answer to that question?

A. Yes.

(Testimony of Maurice Liberman.)

Q. Here today just a moment ago you answered the same question no?

Mr. Moore: We object to that as argumentative, if the Court please.

The Court: Objection sustained.

Q. (By Mr. Romley): Now, was there anything said in the September 20 meeting with regard to the option continuing beyond April 30?

A. No, sir.

Q. The only mention made with regard to the length of the time the option would continue was to April 30th of 1959, is that right?

A. Yes, sir.

Q. After you returned to Albuquerque you prepared the letter agreement of September 23rd, did you not? A. Yes, sir.

Q. You did that without talking to Mrs. Nagel or Mr. Jenkins? [739] A. Correct.

Q. You did talk to your brother?

A. Yes, sir.

Q. Joe Grevey. And you and your brother decided you wanted to write up the memorandum or the letter in a little different language than had been mentioned on September 20th, isn't that right, sir? A. No, sir.

Q. You did write it up in different language, did you not? A. Yes, sir.

Q. In other words, you added something to that agreement that was not even discussed between you and Mrs. Nagel and Mr. Jenkins?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And it never was discussed with them, was it, this change you made? A. No, sir.

Q. That's correct, isn't it?

A. That's correct.

Q. Was that because you and your brother Joe decided that that change should be made?

A. Yes, sir.

Q. When Bob came in I believe you said it was around 9:30 on the morning of the 23rd? [740]

A. Yes, sir.

Q. You didn't discuss the agreement with him, did you? A. No, sir.

Q. You handed it to him, it had already been prepared, I take it? A. Yes, sir.

Q. You dictated it to your secretary?

A. Yes, sir.

Q. You went over it with your brother Joe?

A. Yes, sir.

Q. You agreed this was okay from your side?

A. That this was the agreement that we had.

Q. You made at least one change in the agreement that you didn't have, isn't that right?

A. Yes, sir.

Q. You and your brother Joe agreed this was the agreement you wanted from your side?

A. This was the agreement we had written up.

Q. This was the agreement you wrote up. Then when Bob came in, after the good mornings you handed it to him and said, "Bob, here is the agreement I wrote up," words to that effect?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. There was no discussion, Bob signed it, is that right? A. Yes, sir. [741]

Q. Then how long was Bob there, do you remember?

A. I don't remember exactly, but I will say maybe 15 or 20 minutes.

Q. Did you during any part of that 15 or 20 minutes discuss the language in that agreement at all? A. No, sir.

Q. When he left it was with the understanding he was to go and see Tom Gallagher?

A. Yes, sir.

Q. You told him at that time not to say anything to Tom Gallagher about your deal with the Nagels, isn't that right? A. That is correct.

Q. Did you have any discussion with Bob regarding what he was to say to Gallagher?

A. No, sir.

Q. Did the three of you, Mrs. Nagel, Bob and yourself, agree that Bob Jenkins would go and tell Gallagher that the Nagel Company was not going to exercise its right of first refusal, in order to pave the way for you to renew negotiations with Gallagher as soon as you could get hold of him?

A. No, sir.

Q. Page 133, lines 7 to 13, remember my asking you these questions or this question and you giving this answer:

(Testimony of Maurice Liberman.)

“Question: All right then, the three of you then, Mrs. Nagel and Bob Jenkins in that conference in her office on [742] September 20 agreed Bob Jenkins would go and tell Gallagher that the Nagel company was not going to exercise its right of first refusal, is that right?”

“Answer: That’s right.

“Question: And it was agreed at that time that would be done in order to pave the way for you to renew negotiations with Tom Gallagher, is that right?”

“Answer: To renew, yes.”

Did you make those answers to those questions?

A. Yes, sir.

Q. Under oath? A. Yes, sir.

Q. You say Bob called you the next day from Winslow? A. Yes, sir.

Q. He told you of his talk with Tom?

A. Yes, sir.

Q. Did he tell you what Tom said?

A. No, sir.

Q. Didn’t tell you anything about what Tom had said?

A. He said that Tom made him another proposition.

Q. Did he tell you what that other proposition was? A. To sell him just the mill.

Q. And Bob told you he wasn’t interested in buying just the mill, didn’t he?

A. He said he told Tom he was not [743] interested.

(Testimony of Maurice Liberman.)

Q. Did you know that Bob and Mrs. Nagel were not interested in buying just the mill?

Mr. Moore: I object to that. I don't believe the witness could answer what somebody else knew or what they were interested in.

The Court: He may answer.

Q. (By Mr. Romley): Did you know that neither Bob nor Mrs. Nagel were interested in buying just the mill? A. I didn't know.

Q. In that same telephone conversation he referred to the fact that there had been an agreement with regard to a seven-year period after which they could buy the mill, is that right, sir?

A. No, sir.

Mr. Moore: We object to that as not correctly stating the facts, that there was an agreement.

The Court: I believe the agreement is in evidence.

Mr. Moore: It isn't an agreement. The letter is in evidence, the offer, but it was never accepted.

The Court: The letter.

Q. (By Mr. Romley): Let me reach it this way, Mr. Liberman. In the September 20th conference was there any reference about your selling one-half of the mill after the seven-year period?

A. Not one-half. [744]

Q. Was there any talk at all about selling the mill after the first seven years of operation?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Did you initiate that or did Mrs. Nagel or Bob?

A. I just, during the conversation I just made a statement.

Q. What statement did you make?

A. That I would be willing to sell the mill after seven years.

Q. You volunteered that, did you?

A. Yes, sir.

Q. And they said: That's fine, we would like to buy it? A. No.

Q. What did they say?

A. I don't recollect their answer. [745]

Q. Is that substantially all that was said about the seven-year matter? A. Yes.

Q. And you say that you were not going to sell them one-half interest but the whole mill at the end of seven years, is that right?

A. There was no question about half or the whole thing. I just said that after seven years I would be willing to sell the mill.

Q. Mr. Liberman, at that time you were talking about buying the mill together, weren't you, on a 50-50 basis? A. Yes, sir.

Q. And at that time if that plan worked out at the end of seven years you'd have only owned a half interest in the mill, is that right, sir?

A. Yes, sir.

Q. And that's all you would have had to sell them at the end of seven years if those plans work out? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. So when you left the Nagel office on the 20th was it agreed or understood between you that you would put that in the letter of September 23rd?

A. No, sir.

Q. But Bob called you on the 24th and said, "Maurice, this isn't in here, will you please give us a letter confirming it?" [746]

A. No, sir.

Q. He didn't call you and tell you that?

A. He called me but that's not the way he put it to me.

Q. What did he say?

A. He asked me if I was willing to confirm the statement that I made during the 20th, during our conversation.

Q. And do you remember what statement you made on the 20th?

A. Yes, sir.

Q. And did you intend by this letter of September 24th to make a firm obligation on your part to sell the mill at the end of the seven-year period?

A. I wanted to make a mutual obligation.

Q. Well, did you intend to make a mutual obligation where you firmly committed yourself to sell and Mrs. Nagel firmly committed herself to buy?

A. Yes, sir.

Q. And that was the purpose of this letter of September 24th, is that right?

A. Yes, sir.

Q. And was that the only purpose of that agreement so far as you know?

A. Yes, sir.

Q. And was that agreement to apply only if they came in [747] and bought half of it with you or was it to apply if you bought it alone?

(Testimony of Maurice Liberman.)

A. That statement was made when we were discussing the purchase of Duke City for themselves the mill. In other words, in the beginning of our conversation when we talked mergers and then we got to talk about Duke City buying the mill 100 percent by themselves and that's where the statement, that statement was made.

Q. Well, now, let me see if we can clarify this: Did you mean by this exhibit dated September 24th that if Duke City alone bought the mill, that Nagel would have the right at the end of seven years to purchase if they accepted that agreement?

A. When I have written the letter we already made another agreement, we made an agreement to buy the mill together.

Q. All right. So that if you had bought the mill together and only in that event would they have had the right to buy at the end of seven years, is that right? A. That's right.

Q. Now, I think you said that on October the 8th you saw Tom Gallagher for the first time after the 12th of September? A. Yes, sir.

Q. And you hadn't seen Bob Jenkins or Mrs. Nagel—Mrs. Nagel after the 20th and Bob after the 23rd of September and prior to October 8th, is that right? A. That's right. [748]

Q. Then you started some negotiations with Gallagher, did you not? A. No, sir.

Q. Were there negotiations with Gallagher?

A. When?

Q. On October 8th? A. No, sir.

(Testimony of Maurice Liberman.)

Q. On October 9th? A. Yes.

Q. All right, where did those negotiations take place? A. In his apartment.

Q. In his apartment? A. Yes, sir.

Q. Did he call you there? A. Yes.

Q. Did those negotiations concern the sale of the plant and timber in Winslow?

A. They concerned the—all of Gallagher's properties.

Q. On October 9th did Tom Gallagher make a proposal to you whereby he and you would purchase the Gallagher properties described in the complaint here in Arizona together on a 50-50 basis?

A. Yes, sir.

Q. Did you accept that proposal?

A. He didn't make a proposal, we discussed it. [749]

Q. I thought you just told me that he did make a proposal.

A. There was question, there was a question about we started to discuss purchasing all of the properties together on a 50-50 basis.

Q. Well, let me go back then so that I have your answer clearly, sir.

Did Tom Gallagher, on October 9th, 1958, make a proposal whereby he and you would purchase the Gallagher properties described in the complaint here in Arizona— A. No, sir.

Q. —together on a 50-50 basis?

A. No, sir.

(Testimony of Maurice Liberman.)

Q. And isn't it a fact that you accepted that proposal? A. No, sir.

Q. Page 347 of the deposition, at line 14 on page 347 and continuing over to page 348, line 14:

“Question: And in that same meeting at a later stage you made a proposal to Tom Gallagher that you and he buy the Gallagher properties described in the complaint, namely the properties there at Winslow and the timber on a 50-50 basis, didn't you?”

“Answer: I say I don't remember if I made the proposition, it's possible that Tom made it to me.

“Question: What is your recollection, did you make it [750] or he?”

“Answer: I don't recollect who made the suggestion.

“Question: If he made it to you wouldn't you have accepted it? “Answer: Yes.

“Question: Did you accept it?”

“Answer: Yes.

“Question: All right. Now, Tom Gallagher, you say, made a proposal whereby you and he would purchase the Gallagher properties described in the complaint here in Arizona together on a 50-50 basis?”

“Answer: Yes.

“Question: And that was made, you say, on October 9th, 1958, is that right?”

“Answer: Yes, sir.

“Question: And you say you accepted that proposal? “Answer: Yes.”

(Testimony of Maurice Liberman.)

Was that your testimony?

A. Yes.

Q. That was under oath? A. Yes, sir.

Q. Now, at that time you were already committed to Mrs. Nagel, weren't you?

A. Yes, sir.

Q. How was she going to come in on this deal if you made [751] a new one with Tom Gallagher?

A. I would have submitted the proposal to her.

Q. And let her in on the half that you would have gotten, is that it?

A. Let her in on the terms of our agreement.

Q. Well, 50-50 with you on the 50-50 you had with Tom, is that right? A. That's right.

Q. And did you understand that was in accordance with your agreement or understanding on September 20th and the letter of September 23rd?

A. No, sir.

Q. If it wasn't in accordance with that understanding then? A. No, sir.

Q. But you were going to do it anyway, let her in on it?

A. Well, we were just discussing propositions, Mr. Romley.

Q. No, that isn't my question, sir.

I'm trying to find out if you yourself considered that, under your understanding with Mrs. Nagel and Bob on September 20th, and under your understanding of the agreement dated September

(Testimony of Maurice Liberman.)

23rd, that you would have been obligated to submit this matter to Mrs. Nagel if you and Tom had concluded your deal to acquire the Gallagher properties on a 50-50 basis?

A. I would have had to submit to her. [752]

Q. You would have had to submit to her?

A. That's right.

Q. Under your agreement with her?

A. That's right.

Q. Is that right? A. That's correct.

Q. And she then would have had a right to come in on the 50 percent you would have gotten so that you and she would have had 25 percent each and Tom 50 percent, is that right?

A. Well, we had to discuss it. I don't know what—I would have submitted to her the proposal, the best thing I got from Gallagher.

Q. Okay. Now before that time, though, you already accepted Tom's proposal and then you were going to submit it to her after that, isn't that right?

A. No.

Mr. Moore: We object to that, if your Honor please, it's argumentative and he takes one answer out of context in a deposition and doesn't give the witness a chance to explain, and he excluded on—and has objected to this evidence when I tried to offer all those negotiations.

The Court: No, he may answer this question.

The Witness: Would you please read the question?

(Testimony of Maurice Liberman.)

The Court: I'm confused myself.

(Whereupon, the pending question was read by the reporter.) [753]

A. Well, it was a proposal. There were conversations and we were negotiating, I wouldn't say it was a proposal and I wouldn't say that I accepted it. He said he would consider it and will submit it to the group that he was interested and will give me an answer later.

Q. But in any event you considered, as you said in the deposition when I read to you a while ago, that Tom had made you a proposal to go in with you on a 50-50 basis on the purchase of the Gallagher properties in Arizona?

A. I don't know if he made the proposal or I made the proposal. We had some—we had discussions and I can't remember if he made the proposal or I made the proposal. I asked him if he would consider to go in with me on a 50-50 basis.

Q. That came up as a result of your asking him?

A. I don't remember, Mr. Romley.

Q. Didn't you just tell me that you made the suggestion to him if he would consider going in with you on a 50-50 basis?

A. Well, I couldn't—don't remember saying what—the exact words, what happened there. But we originally, we talked about a 50-50 purchase of all the properties and then the conversation drifted to a 50-50 proposition on the Winslow [754] properties.

(Testimony of Maurice Liberman.)

Q. And you either told him that you would go in with him on a 50-50 basis on the Gallagher properties in Winslow or he told you and you accepted, one or the other is true, is that right.

A. That's right.

Q. Now, you did that without first consulting Mrs. Nagel? A. That's correct.

Q. And you intended, if that deal were consummated, to submit it later to Mrs. Nagel and let her come in on it?

A. That's right, discuss it with her. I didn't know what we were going to do. I wanted—I felt that I had obligation and I wanted to submit it to her and discuss it with her.

Q. And that was the obligation that you said you felt you had under your September 20th and September 23rd? A. September 23rd, yes.

Q. Now, you went to New York on the 12th of October? A. Yes, sir.

Q. I think you said that Mr. Rosenthal met you at the airport? A. Yes, sir.

Q. I'm not sure that the record discloses who Mr. Rosenthal is, what is his connection with the transaction? A. He is our advisor.

Q. He is your business advisor?

A. Yes, sir. [755]

Q. And your accountant?

A. Well, not accountant, I wouldn't say that he is our accountant?

(Testimony of Maurice Liberman.)

Q. He lives in New York City?

A. Yes, sir.

Q. How long has he been your advisor?

A. Since '43.

Q. Did you call him and arrange for him to meet you at the airport? A. I would say so.

Q. And what was it you wanted to discuss with him?

A. I just wanted to discuss with him all our current affairs. When I am in New York we——

Q. You mean your affairs outside of this proposed purchase?

A. That's right, all of our business. We review all of our state of our business.

Q. Did you tell him at that time that you had an agreement with Mrs. Nagel with regard to the contemplated purchase of the Gallagher properties?

A. I don't know when I told him about it, but I told him during my stay in New York.

Q. One of your purposes in going to New York was to see if you could negotiate directly with either A. I. Kaplan or Jack Kaplan for the purchase of those properties? [756]

A. Well, yes, it was one of the purposes. My main purpose was going over there to clear up my—the name calling that Gallagher called me before the Kaplans, they were my friends and I wanted to straighten out things.

Q. One of your purposes was to try to buy the properties?

(Testimony of Maurice Liberman.)

A. It would have been. First I had to clear up the matter of the wires and calling me blackmailer and so forth, I couldn't talk business with them.

Q. Whether you had to do that or not, one of your main purposes was to see if you could buy the Gallagher properties, is that right?

A. Yes, sir.

Q. Now, at that time there was no definite proposal pending, was there?

A. There was still in my mind the proposal of September the 12th.

Q. But you say Tom Cavanaugh told you that Gallagher said it was off, isn't that right?

A. Yes, sir.

Q. And Tom Gallagher, when you met him on the 8th or 9th of October, still told you that that deal was off, didn't he?

A. Yes, sir.

Q. So when you went back to New York you were going—was one of your purposes now to try to work out a new proposal for the purchase of the properties, the Gallagher properties? [757]

A. I didn't know if it was a new proposal, I wanted to talk to the Kaplans about the 12th of September proposal.

Q. Well, you wanted to talk to them about the September 12th proposal and try to buy them on that basis?

A. Yes, sir.

Q. And if you couldn't on that basis, then you wanted to see if you couldn't buy them on some other basis that was agreeable, is that right?

(Testimony of Maurice Liberman.)

A. Mr. Romley, when I went there I didn't have any preconceived, I didn't know even that I was going to buy the property in that trip.

Q. Didn't you tell us it was one of your purposes, one of your main purposes in going there was to see if you couldn't buy the Gallagher properties?

A. It was one of my purposes to see, to talk to them about the September 12th proposal.

Q. To see if you could buy it on that basis?

A. To ask them why, what happened.

Q. To see if you could buy it on that basis?

A. Yes, sir.

Q. All right. And then if you couldn't buy it on that basis you were going to see if you could negotiate on some other basis that was satisfactory, is that right? A. Yes, sir.

Q. Now, when you went there with these ideas in mind that [758] you have related here this afternoon, you also had in mind, did you not, that if you were to make such a deal that Mrs. Nagel would have the right to acquire a one-half interest in it under your September 23rd letter, is that right?

A. If I had a proposal, yes, if I would get a proposal for them I would submit it to her.

Q. Now, you felt then, when you arrived in New York on the 12th of October, that whatever deal you worked out with Kaplans and Gallagher for the purchase of the Gallagher properties was a deal

(Testimony of Maurice Liberman.)

in which Mrs. Nagel would have the right to participate to the extent of acquiring a one-half interest, is that right? A. Yes, sir.

Q. And of course that deal that you were talking about then was plant and timber, wasn't it?

A. To them when I talked to them?

Q. Yes. A. Yes.

Q. And you were then prepared to negotiate a deal for plant and timber and allow Mrs. Nagel to come in on that on a 50-50 basis, isn't that right?

A. I would have reported to Mrs. Nagel and asked—then I asked her also to come out to discuss with her what kind—

Q. Let's get it one at a time, sir. Read him the question, please. [759]

(Thereupon, the pending question was read by the reporter.)

A. Yes, sir. [760]

Q. So we have the question of plant and timber straightened out once and for all, have we?

A. No, sir.

Mr. Moore: I object to that, if the Court please, as argumentative.

The Court: The objection is sustained.

Q. (By Mr. Romley): Now, you started your negotiations, I believe on either the 14th or 15th of October, right?

A. I had seen the Kaplans the 14th.

Q. When did you start your negotiations?

A. The 15th.

(Testimony of Maurice Liberman.)

Q. And you talked to A. I. Kaplan on the 14th?

A. Yes, sir.

Q. He told you the contemplated purchase would have to be discussed with Tom Gallagher and with his brother Jack Kaplan, is that right?

A. Yes.

Q. And Tom Gallagher was not in New York?

A. No, sir.

Q. Tom was called and he flew to New York to take part in these negotiations, is that right?

A. I don't know.

Q. Did he fly to New York?

A. I don't know.

Q. Did he go to New York? [761]

A. I saw him the next day.

Q. Well, he wasn't there on the 14th, was he?

A. No, sir.

Mr. Moore: Your Honor, I don't know—New York is a big place. This witness wouldn't know whether a man was in New York or not.

The Court: Better limit it to Kaplan.

Q. (By Mr. Romley): Did Mr. Kaplan say to you it would be necessary for Tom to come out from Albuquerque to take part in those negotiations? A. No.

Q. But the next day or next evening, rather, at the Jack Kaplan home Tom Gallagher was there?

A. Yes, sir.

Q. You had been negotiating most of that day of the 15th in your room with Jack Kaplan?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Did Jack tell you that Tom was coming out?

A. He told me that he was expecting him.

Q. That he was expecting Tom Gallagher to get there for the negotiations?

A. He didn't say for the negotiations, he told me he expected him.

Q. And when the conference broke up on the afternoon, I assume the afternoon of the 15th, is that right? [762]

A. Around four or five o'clock.

Q. Late afternoon on the 15th, you made arrangements to meet at Jack Kaplan's home?

A. No, sir.

Q. Were any arrangements made with regard to a further conference?

A. Mr. Kaplan called me later and asked me to come over to his apartment.

Q. When he left did he ask you to stand by for a possible later meeting? A. I don't recall.

Q. And when he called you and asked you to come over to his home for a conference, did he tell you that Tom Gallagher was there?

A. I don't think so.

Q. You got there around eight o'clock or thereabouts? A. Yes.

Q. Tom Gallagher and Bob Gallagher, I think you say, were there at the Kaplan home?

A. We first got into a parlor and talked with Jack Kaplan and I didn't know the Gallaghers were there.

(Testimony of Maurice Liberman.)

Q. You later found out they were there?

A. Later he told us they were there and we went into another room.

Q. Sometime between eight and nine o'clock you got into [763] some serious negotiations regarding this transaction?

A. Yes, sir.

Q. Did all of you present take part in those negotiations or was it limited to you and Jack Kaplan and Tom Gallagher?

A. No. First we discussed, Joe Rosenthal and myself and Jack Kaplan, we discussed negotiations and then Mr. Kaplan—

Q. You, Joe Rosenthal and Kaplan alone?

A. Yes, sir.

Q. In Tom's absence?

A. That is correct.

Q. That went on for a few minutes or half hour or so?

A. Something like that.

Q. Did Kaplan say, "Tom is here, we will have to talk to him too," words to that effect?

A. Something to that effect. I believe that at that time we knew already that the Gallaghers were there.

Q. Then for some several hours negotiations were participated in by you and Joe Rosenthal, Jack Kaplan and Tom Gallagher?

A. Tom Gallagher and Bob Gallagher.

Q. And Bob Gallagher too. That ended up about two o'clock with a proposal to sell the plant and timber, the Arizona properties, to Duke City, isn't that right?

(Testimony of Maurice Liberman.)

A. It wasn't a proposal. We got a conclusion, some kind [764] of understanding.

Q. Okay. The conference ended at about two o'clock, at which time, by which time you had agreed, subject to an acceptance by either party at eleven o'clock that morning of the sale by Arizona Timber Company of all of the Gallagher properties to Duke City—and when I say Gallagher properties, I mean plant and timber. Is that right, sir?

A. We didn't have an agreement, we had a tentative understanding with a price of \$650,000 and \$17 for the timber, with the understanding that either party had the right to give a final answer at eleven o'clock.

Q. How far were you from the Essex House when you left at two o'clock, left the Kaplan home?

A. It was not too far. In a cab I would say eight to twelve minutes, something like that.

Q. Were you at your room shortly after two o'clock, ten or fifteen minutes after two?

A. Yes, sir.

Q. Did you and Joe Rosenthal sit up and discuss the matter? A. No, sir.

Q. Went right to bed? A. Yes, sir.

Q. You felt at that time that this was a matter that came under the agreement you had with Mrs. [765] Nagel of September 20 or September 23rd, is that right?

A. Will you please restate that?

(Testimony of Maurice Liberman.)

Q. Did you feel at that time around two or two-fifteen on the morning of October 16 the understanding that had been reached at the Kaplan home involving the sale of the plant and timber was one in which Mrs. Nagel had a right to participate under your September 20th or September 23rd agreement?

A. Yes. That was the reason I asked a delay to eleven o'clock.

Q. There was no question in your mind about it then, was there?

A. No, sir.

Q. You felt and had left it that by eleven o'clock you would give Gallagher an answer if he wanted it or he would give you an answer of some kind, is that right?

A. That is correct.

Q. What answer would he give you? What was he to do by eleven o'clock?

A. Here is the thing what happened——

Q. No. What was he to do by eleven o'clock, if anything?

A. He had to find out from me if I wanted to accept the proposition.

Q. Is that all?

A. Yes, sir. [766]

Q. The only thing was it was left open for you to accept or reject by eleven o'clock?

A. Yes, sir.

Q. Two o'clock in the morning under our stipulation here it was then eleven o'clock in Winslow, wasn't it?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. Why didn't you call Mrs. Nagel and talk to her at eleven o'clock that night before you went to bed and tell her about the proposal that you admit you should have submitted to her?

A. I was tired.

Q. You were tired. Did you recognize if she had to give you an answer right away that it was something that would require some time or study perhaps on her part, did you recognize that?

A. Yes, sir.

Q. Instead you waited until eleven o'clock on the morning of the 16th before you called her?

Mr. Moore: We object to that as a misstatement of the evidence.

Q. (By Mr. Romley): Nine o'clock. Excuse me, my error. You waited until nine o'clock to call her?

A. Yes, sir.

Q. By two hours later you had to accept or reject? A. Yes, sir. [767]

Q. Did you make any notes of the first call you made to Mrs. Nagel? A. No, sir.

Q. Are you sure? A. Yes, sir.

Q. Did you make any notes of the second call you made to Mrs. Nagel? A. No, sir.

Q. Are you sure? A. Yes, sir.

Q. Do you remember your testimony at the deposition with regard to notes? A. Yes, sir.

Q. Do you remember testifying that you did make notes of both of those calls within, just within thirty minutes after they were made?

(Testimony of Maurice Liberman.)

A. Yes, sir.

Mr. Moore: I think he said he thought he made them. I don't know that he said he was positive, and looks and finds he didn't.

Q. (By Mr. Romley): On page 238 of your deposition, line 9:

“Question: Were any notes made by you during the course of that conversation?”

“Answer: Possibly. Not to my recollection. [768]”

“Question: I mean did you write down on a piece of paper anything that was said during the time it was being said and while this conversation was taking place?”

“Answer: I made notes afterwards.

“Question: How long afterwards?”

“Answer: Maybe half an hour or so.

“Question: Half an hour after the telephone call had been completed, is that right?”

“Answer: That's right.

“Question: Did you make those notes alone?”

“Answer: What do you mean alone?”

“Question: I mean did you make them alone or someone assist you?”

“Answer: No, I made them alone.”

Did you make those statements?

A. Yes, sir.

Q. Now you say there are no such notes of the first or second conversation?

A. I thought I made notes.

Q. Now you say there are none?

A. Yes.

(Testimony of Maurice Liberman.)

Q. I believe an exhibit here in evidence, G shows that three telephone calls were made from New York to Winslow, is that right, sir?

A. Yes, sir. [769]

Q. Do you remember calling the Arizona Timber Company office in Winslow on that day?

A. No, sir.

Q. Or do you remember any call being made on that day from your room at the Essex House to the Arizona Timber Company office by you or by Mr. Gallagher when he came there at eleven o'clock in the morning?

A. No, I don't remember.

Q. You don't remember? A. No.

Q. I hand you, sir, an exhibit marked Plaintiffs' Exhibit 22 for identification. Is that a Thermofax copy of a letter written by Mrs. Bishop on your behalf to the Mountain States Telephone Company on November 5, 1959?

A. Yes.

Q. And the answer thereto by the company, dated November, I think it is 12, I am not sure, is that right, sir?

A. Yes.

Q. Do you remember that on the second page of this exhibit you only inquired about two telephone calls to Winslow?

Mr. Moore: Let me look at the exhibit, Mr. Romley, before you start talking about what is in it.

Mr. Romley: The exhibit you gave me, Mr. Moore.

We offer Plaintiffs' Exhibit 22 in evidence, your Honor. [770]

(Testimony of Maurice Liberman.)

Mr. Moore: Your Honor, I don't see the materiality of it. I don't think if it is offered for impeachment, I don't think it impeaches the official bill that was received.

The Court: It may be received.

(Plaintiffs' Exhibit 22 marked in evidence.)

Q. (By Mr. Romley): The first call you made on October 16th to Mrs. Nagel advised her that you had negotiated a contract for the purchase of the Gallagher properties and that you had to give an answer by eleven o'clock, I think that is correct, is it, sir? A. No, sir.

Q. Is that part of what you told her?

A. I told her that we got to an understanding with Gallaghers, they wanted for the mill \$650,000 and \$17 for the timber.

Q. You told her about the timber because she was going, she had a right to participate in the purchase of the timber, isn't that right?

A. Mr. Romley, I don't know whether she had a right or not. I wanted her in, I wanted her to come in and I told her to come out to New York to participate in the purchase, because I wanted her in. I didn't consider if she had the right or didn't have any rights. I told her that I wanted her.

Q. You actually wanted her in on this deal, is that right? [771] A. Yes, sir.

Q. As badly as you want her out of the deal now?

(Testimony of Maurice Liberman.)

Mr. Moore: We object to that, if your Honor please, improper cross examination, argumentative.

The Court: Objection sustained.

Q. (By Mr. Romley): Was there any particular reason why you wanted her in the deal?

A. We had an agreement and another reason is I wanted her to participate because it was a financial burden to us and an obligation, very substantial obligation and we wanted her to share in it.

Q. Did you consider it was a good deal for you, I mean the purchase of the Gallagher properties on those terms? A. I don't think so.

Q. You didn't think so? A. No.

Q. You went ahead and made a deal you didn't think was a good deal, is that what you are telling us?

A. It was a deal and I wanted to buy it, as far as we were concerned, for our half, we wanted to buy it.

Q. Did you consider it was a good deal or a bad deal when you finally closed on it at eleven o'clock that morning?

A. That is the conditions I could buy it. We negotiated, I tried to get it at the previous terms, and that is the best terms I could obtain. [772]

Q. Now, did you ever compute the amount of timber that would go with that deal?

A. You mean during our negotiations?

Q. Either during your negotiations or immediately before or after while back there in New York?

(Testimony of Maurice Liberman.)

A. In New York in the evening at two o'clock when we discussed the thing, Kaplan asked me to pay him for the timber. We were liquidating our pooling agreement and we got to discuss how much timber I will owe him. In other words, we rescinded our pooling agreement and we had to figure out how much timber I got, how much lumber I got from their holdings, from the timber they paid for.

Q. I see. And is that this 18,852,000 feet referred to on Exhibit 9 under paragraph 3-A—let me show you that, sir?

A. I suppose that is what it is.

Q. Here is Exhibit 9. You say there under paragraph 3-A: Uncut, under existing—let's see. 2-B it is, owed by Duke City 18,450,000 feet. Is that the timber you are talking about that you owed to Gallagher?

Mr. Moore: We object to the form of the question, if your Honor please, that he owed Gallagher. He said they wanted money for what he owed him. That is a misstatement of the witness' testimony in his last answer.

The Court: I believe he was talking about a [773] conversation with Kaplan in New York.

Q. (By Mr. Romley): Just keep that because I will ask you several questions respecting Exhibit 9. In your conversations with Gallagher and Kaplan that night or early in the morning of the 16th, you got around to talking about the timber, is that right, sir? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And one of the matters you talked about was the amount of timber that you owed Gallagher under the pooling agreement, is that right, sir?

A. We discussed about liquidating the pooling agreement and terminating the pooling agreement and I got lumber from timber that he paid for. In other words, we went back as if we didn't have any pooling agreement.

Q. In order to determine whether you owed him anything and if so how much?

A. That's right.

Q. Now then, did you determine that night you did owe him for something more than 14 million feet of timber?

A. We determined I owed him for timber. We didn't determine any quantities.

Q. Was it later determined that you owed him for 18,450,000 feet of pine timber?

A. Yes, sir.

Q. And that is this item 2-A owed by Duke City [774] on Exhibit 9, is that right?

A. That is money I owed him, yes.

Q. Not the money, that is the timber, isn't it?

A. I owed him money for the lumber he gave me.

Q. Did you at that time also discuss the fact that there were some Forest Service contracts under which Gallaghers had the right to cut timber?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And was it understood in that conference that if you accepted the proposal by eleven o'clock in the morning you would get as a part of this deal the uncut Forest Service timber? A. Yes, sir.

Q. Is that the 18,852,000 feet referred to in paragraph 3-A?

A. I don't know as far as the amount, but I would say—

Q. That sounds right?

A. I don't remember the amount, but I would say—

Q. Then did you discuss also as a part of this deal you would get certain timber that Gallagher had under contract for Aztec with Southwest?

A. Some timber rights—yes.

Q. Is this item of 2-A, 15,235,000 that timber?

A. That's the timber, I don't remember the feet.

Q. The amounts? [775] A. Yes.

Q. You did discuss it and you were to get that timber as part of this deal? A. Yes.

Q. For the Aztec you were to pay \$17 a thousand net log scale? A. Yes, sir.

Q. And for the Forest Service you were to pay the original contract price on the Forest Service timber, is that right?

A. We were to take over the contracts, that's right.

Q. Did you at that time, sir, intend to run through this mill, manufacture into lumber the uncut Aztec, under the Gallagher contract?

A. Yes.

(Testimony of Maurice Liberman.)

Q. And also the uncut Forest Service under the Forest Service existing contracts? A. Yes.

Q. And also the 62,505,000 feet of timber under your Aztec contract, which are items 1-A and 2-B?

A. Yes.

Q. So it was your full intention then that all of this existing timber that I have mentioned in 1-A, 2-A, 2-B and 3-A would be milled in this Arizona Timber Company mill in Winslow?

A. It was the intention, I had to discuss with [776] Mrs. Nagel and make a deal with her. I didn't know yet what we were going to do. That was the reason why I wanted to ask the eleven o'clock delay and the reason why I called Mrs. Nagel and wanted her to come to New York, because we had to discuss all the matters here. We didn't have anything yet agreed to.

Q. You wanted to discuss all those things before you gave Tom his answer? A. That's correct.

Q. How could she have gotten there in two hours?

A. All I wanted from her was to tell me she wanted to participate. [777]

Q. You say and if she'd told you she wanted to participate that would—she'd have been in, is that right? A. No, sir.

Q. Well, then, what more would she have had to do?

A. Well, she would have had to come to New York and for us to discuss all the matters before we made the purchase.

(Testimony of Maurice Liberman.)

Q. Before you made the purchase?

A. Yes, sir.

Q. I thought you said you had to tell Gallagher by 11 o'clock, two hours later whether you were going to make the purchase or not?

A. Yes, sir.

Q. How were you going to tell him at 11 o'clock if you were going to wait until she got there?

A. Well, suppose—if Mrs. Nagel would have told me she wanted to participate, I would have told—and she would have come up to New York I would have told the Gallaghers at 11 o'clock this is—"this purchase is going to be made, I have an agreement with Mrs. Nagel and she is coming out and we want to purchase it together. And I want some more time to wait until she would get in and then we will discuss that."

Q. I see. And then when she came there you would have talked about terms for milling the timber, is that right?

A. We would have talked—we had to make an agreement probably, we had a lot of things to talk about. [778]

Q. And in the meantime Tom Gallagher and Kaplan were supposed to wait and see?

A. They would have waited, I would have asked them to wait.

Q. When you made that purchase at 11 o'clock that morning, sir, did you anticipate that in addition to this already existing timber under contract,

(Testimony of Maurice Liberman.)

either Forest Service or Aztec or your own, that there would be cut under future contracts with the Forest Service any timber to be manufactured into lumber through this mill?

A. I haven't considered it, I haven't given any consideration about it.

Q. You haven't even thought about it at all?

A. At that time I haven't considered anything about future sales.

Q. How many times have you bought saw mills in your life?

A. Bought saw mills? If my recollection is correct the Winslow deal was the second one.

Q. Which one was the first?

A. Gallinas mill.

Q. At that time was there any private timber involved? A. No, sir.

Q. How big an operation was that?

A. Oh, about eight, nine million feet.

Q. Is that a profitable operation? [779]

A. Yes, sir.

Q. That's less than the ten or twelve million feet that we were talking about milling in the last five or six years in this mill, isn't it?

A. Yes, sir.

Q. Now, when you bought the Gallinas mill was there some Forest Service timber already under contract? A. Yes, sir.

Q. Were you at that time acquainted with the practice of the Forest Service to put up timber for sales that supplied the Gallinas mill?

(Testimony of Maurice Liberman.)

A. Yes, sir.

Q. Did you anticipate in connection with that transaction that you would run through the Gallinas mill not only the timber under existing contract but also timber that would be put up for sale in the future by the Forest Service? A. No, sir.

Q. You didn't take that into account at all?

A. I took it into account but I had also competition up there, they bid me up the timber \$18 a thousand feet.

Q. Now insofar as the timber is concerned, supplying the two Winslow mills from the Chevalon working circle, is it your testimony that you didn't even consider whether there'd be any future Forest Service timber that could be run through that [780] mill?

A. Mr. Romley, you are talking about the time I was in New York and negotiating on the deal?

Q. Yes, sir.

A. I haven't given any thought about it.

Q. At the time you were in Tom Gallagher's office on September 10th and talked to him about the matter did you consider it then?

A. Yes, I expected there was sales put up and I expected to bid like anybody else.

Q. Then you expected that there would be some timber that you would have the right to bid on to be manufactured in this present Duke City mill, isn't that right, sir? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And that would be the timber referred to in the management plan, is that right?

A. Yes, sir.

Q. Now, after you received the telegram from Mrs. Nagel you say you put in another call to her?

A. Yes, sir.

Q. And you told her you had purchased the Gallagher properties? A. Yes, sir.

Q. The plant and the timber? A. Yes, sir.

Q. And you told her you were surprised at her telegram? [781] A. Yes, sir.

Q. And she told you there was no mistake about the telegram, that she in fact did not release you, didn't she? A. No, sir.

Q. The telegram said that she did not—would not release you at the present time?

Mr. Moore: We object, your Honor, the telegram is in evidence and it speaks for itself.

Mr. Romley: I think that's right, your Honor.

Q. (By Mr. Romley): Now, although you had already accepted the deal with Tom Gallagher at the time you had this last call you still felt that Mrs. Nagel had a right to participate in the purchase of the plant and the timber, did you not?

A. Mr. Romley, I wanted her in and I told her so. Now, if she had a right or didn't have a right, I didn't call her at that time to establish if she had a right. I wanted her in and I told her that if she wanted, I would give her that additional 48 hours.

(Testimony of Maurice Liberman.)

Q. Now, what would you have done in that additional 48 hours?

A. And I asked her to come out to New York, we haven't finished yet our negotiations, final negotiations with the Gallaghers.

Q. I thought you had finished your negotiations and accepted the proposal at 11 o'clock that [782] morning?

A. No, sir, we had an understanding and I accepted the understanding. They were drafting the memorandum that we signed Saturday, the 18th.

Q. Well, did you feel that you didn't have a deal at 11 o'clock then?

A. We had an understanding but I can't say that we had a deal.

Q. You had agreed to buy and they had agreed to sell?

A. Yes, but they were yet—we had to establish the details of the thing, the final document is about how many pages?

Q. Now, there was a draft of that agreement prepared in New York City, wasn't there?

A. Saturday, the 18th.

Q. And that's not as long as this final draft, is it? A. Well, it's pretty long too.

Q. Well, is it as long as this final draft?

A. No, sir.

Q. All right. Now, did you take part in the negotiations of this New York draft? A. No, sir.

(Testimony of Maurice Liberman.)

Q. Did you sit in with the lawyers or the accountants or anybody that had anything to do with that? A. No, sir.

Q. When did you return to Albuquerque? [783]

A. The 19th.

Q. Did you come directly from New York?

A. Yes, sir.

Q. Did you make any financial commitments in New York for this transaction?

A. Our comptroller went over, I called him the 16th and he went over to contact the bank and get commitments.

Q. You mean in New Mexico?

A. Yes, in Albuquerque.

Q. Did you ever borrow any money on that commitment?

A. I don't remember. Mr. Cavanaugh will know better about it.

Q. Well, isn't it a fact that you did not have to make any down payment on this purchase price when you signed the agreement on the 11th—on the 6th of November except the first \$10,833 and the \$11,000 roughly for the timber?

A. Oh, yes, we had to make some prepayment for deposit and we had to make payment.

Q. Now, the eighteen million-odd feet that you owed for at \$17 a thousand feet is the item of approximately \$317,000 that you mentioned earlier?

A. Yes, sir.

Q. That you were to pay out over a period of three years, is that right? A. Yes, sir. [784]

(Testimony of Maurice Liberman.)

Q. Now, if Mrs. Nagel had come in on this deal she wouldn't have had any part of that obligation, would she? A. That's correct.

Q. The only thing she would have had to participate in so far as payments are concerned would be the \$650,000 payable at the rate of \$10,833 a month and also the remaining items less than \$200,000 as shown by these schedules in the answers to interrogatories that were referred to in the evidence the other day, is that right?

A. I don't know, no.

Q. Let me direct your attention to them, sir. These are answers to interrogatory number 6. Page 1 of that schedule shows the payment to be made on the plant alone, is that right, sir?

A. Yes, sir.

Q. That's the \$650,000 item? A. Yes, sir.

Q. The first payment made on December 12th, \$10,833.33, is that right, sir? A. Yes, sir.

Q. Now, you have made prepayment on that to the extent of \$250,000 over and above the \$10,833.33 a month, is that right? A. That's right.

Q. And those were paid out of operations, [785] weren't they?

A. Paid out of our general funds.

Q. You didn't borrow money to do that?

A. As I told you before, I don't remember.

Q. Now, the second page of this schedule answering interrogatory number 6 shows the amount to be paid for timber, is that right, sir?

(Testimony of Maurice Liberman.)

A. Yes, sir.

Q. Now, that includes the \$317,000 approximately, that you owed and that Mrs. Gallagher—Mrs. Nagel would not have had to participate in, is that right?

A. That's right.

Q. So deducting that three hundred seventeen from four hundred five, you'd have about \$88,000 only in which she would have had to participate, isn't that right, sir?

A. I can't answer that question.

Q. Why, sir?

A. Because we haven't talked yet with Mrs. Nagel, she didn't come out. I asked her to come out so we could discuss on what terms, what we were buying, who would buy the timber, all the questions had to be discussed.

Q. Well, if she'd have come out you'd have had a 50-50 deal, wouldn't you?

A. Yes.

Q. And on that 50-50 deal she would have had to pay over a period of three years one-half of \$88,000 on this timber, is that right? [786]

A. On the 50-50 deal on the things that we were to discuss and agreed to buy, in other words in the things that she would have participated.

Q. Well, she wasn't going to have to pay any more than the one-half you would pay, was she?

A. That's correct.

Q. And she wouldn't have paid any part of the three seventeen?

A. That's correct.

(Testimony of Maurice Liberman.)

Q. All right. Now, let's go to the third page of schedule answering interrogatory number 6. That represents the amount you had to pay for deposit and road insurance, et cetera, is that right, sir?

A. That's right.

Q. \$96,148, is that right? A. Yes.

Q. How was that paid or to be paid?

A. That was to be paid in cash.

Q. All right. And Mrs. Nagel, had she come in, would have only had to come up with 48,000 in cash to meet this one-half, is that right?

A. If we would have agreed that she participate in all the things, yes.

Q. Well, is there any question in your mind that you [787] wouldn't have agreed that she would participate in all those things?

A. We had an agreement that—and our agreement was that she could participate in the purchase of the plant.

Q. In the purchase of the plant?

A. That's right.

Q. But not in the purchase of the timber?

A. Well, I called—when I called her I gave her the facts about what the proposition from Gallagher was, and I asked her to come out so we could discuss among ourselves all matters.

Q. And when you wrote her on September 23rd, 1958—this is Exhibit 3 in evidence—did you intend, sir, that she would have the right to participate in a 50-50 purchase on the same terms as you would get from the Arizona Timber Company?

(Testimony of Maurice Liberman.)

A. Yes, sir.

Q. Did you intend at that time that the mill would be operated as any normal lumber mill is operated for the purpose of manufacturing timber into lumber?

A. Well, normally, yes, that's what I thought, that's what I wanted to buy it for. I didn't buy it to put it idle, but we haven't agreed to anything.

Q. Well, Mr. Liberman, isn't it true that on September 20th, 1958, you were both talking about acquiring this mill and this timber and milling this timber through this mill? [788]

A. No, sir.

Q. You say that wasn't talked about there that day?

A. No, sir.

Q. You were talking only about buying it and both participating in a 50-50 basis?

A. We agreed that—Mr. Romley, the agreement speaks for itself.

Q. Well, let me read to you from that agreement, sir. You state the agreement in the first two paragraphs, don't you? Well, really in the second paragraph, the first paragraph you refer to the first refusal and the second refusal, don't you?

A. That's right.

Q. And the second paragraph you say it is now mutually agreed thus and so, don't you?

A. Yes, sir.

Q. And then in the third paragraph and the final one, you don't say this agreement or anything else, you say, "This option," the option to buy.

(Testimony of Maurice Liberman.)

"This option remains in force until April 30, 1959," don't you?

Mr. Moore: We object to the misstatement, I don't think it says "this option to buy."

Q. (By Mr. Romley): Does it say "This option remains in force until April 30, 1959"?

A. Yes, sir.

Q. Was that an option to buy? [789]

A. It was an option to participate in the purchase, if a purchase or a proposition was made, and we could make a purchase.

Q. Then would you interpolate there as meaning "This option to participate in the purchase remains in force until April 30th, 1959," is that what you meant by it?

A. Yes, that the agreement that we could both participate in the purchase was——

Q. And you say that Mrs. Nagel had the option to participate in that purchase until April 30th, 1959?

A. No, sir.

Q. Now, you talked with Bob Jenkins regarding this matter for the first time after that October 16th transaction on or about the 15th of November, I think it's your testimony, is that right?

A. At the Phoenix Airport, not about this matter.

Q. Well, you talked to him before that about something else, didn't you?

A. I saw him in Prescott.

(Testimony of Maurice Liberman.)

Q. You were both present at a trial there?

A. Yes, sir.

Q. He told you at the airport in Phoenix on November 15th that he wanted to talk to you, didn't he?

A. Yes, sir.

Q. Did he say to you that he wanted to talk to you about [790] this purchase from the Gallaghers?

A. No, sir.

Q. Did you ask him what he wanted to talk to you about?

A. He told me he wanted to talk to me about the Winslow mill.

Q. Did you ask him what in particular he wanted to talk about in regard to the Winslow mill?

A. No, sir, my plane was leaving and—

Q. You didn't have time?

A. We didn't have time at all.

Q. So because you became ill as you say you didn't go to Winslow?

A. I didn't return to Winslow, that's correct.

Q. Now, you did meet later, and I think you said it was on December 24th, 1958?

A. Yes, sir.

Q. He came to your office and wanted to talk to you about this property, these Gallagher properties?

A. He asked me for the contract, he wanted to see the contract.

Q. And you refused to let him see it?

A. Yes.

(Testimony of Maurice Liberman.)

Q. You refused at that time to tell him what the terms were of the purchase, didn't you?

A. Well, they knew the terms. [791]

Q. Did you refuse at that time to tell him the terms of that agreement?

A. I refused to show him the contract.

Q. When you refused to show him the contract, did he then ask you with regard to the terms of that agreement?

A. I don't recollect, Mr. Romley. He told me that his mission was to see the contract.

Q. Did you then suggest that you go to your lawyer's office? A. Yes, sir.

Q. He went with you? A. Yes, sir.

Q. That was Judge Johnson's office in Albuquerque? A. Yes, sir.

Q. Did Mr.—by the way, Mr. Jenkins came there alone, I take it, is that right?

A. To the best of my recollection.

Q. Mrs. Nagel wasn't with him?

A. No, I don't think so.

Q. With regard to—strike that, please.

Did Bob again, in Judge Johnson's office, ask you to allow him to see the agreement?

A. Yes, sir.

Q. You refused again? A. Yes, sir. [792]

Q. Did he ask you to tell him what was in the agreement, what its terms were?

A. Well, he asked me to see the agreement.

Q. Did he ask you what the terms of the agreement were? A. Not to my recollection.

(Testimony of Maurice Liberman.)

Q. On page 290 of your deposition, beginning at line 16 to page 291, line 15:

“Question: And he wanted to see the agreement?”

“Answer: Maybe, it’s possible, I don’t recollect.

“Question: And if he did you again refused?”

“Answer: Yes.

“Question: As a matter of fact on these three occasions you have already told us about, on December 24th, 1958, in your office, early January in Judge Johnson’s office, and here at breakfast with Bob Jenkins in Phoenix, on those occasions you not only refused to let him see the agreement, but refused to tell him what was in the agreement, isn’t that right?”

“Answer: That’s right.

“Question: Refused to tell him the terms of the agreement, isn’t that right?”

“Answer: That’s right.

“Question: And refused to tell him what the consideration or the purchase price was, isn’t that right?”

“Answer: No, they knew the purchase price, I told Mrs. [793] Nagel from New York.

“Question: She knew the purchase price?”

“Answer: Yes, sir.

“Question: But these other things, they didn’t know and you refused to tell them, is that right?”

“Answer: Yes, sir.”

Did you make those answers to those questions?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Mr. Moore: Your Honor, we object to that as not being impeaching testimony to anything the witness has said.

The Court: Objection is overruled.

Q. (By Mr. Romley): Your answer is yes?

A. Yes, sir.

Q. Now, when you, as the result of Bob's being unable to get you to tell him the terms of the agreement, or to show him the agreement in Albuquerque at your office and in Judge Johnson's office, then he returned, he left there without getting that information, is that right, sir?

Mr. Moore: We object to the form of the question as a misstatement of the evidence, if your Honor please.

The Court: May I hear the question?

(Whereupon, the pending question was read by the reporter.)

Mr. Moore: There is no evidence that he asked for the terms, the evidence here is that he asked for the agreement, [794] asked to see it and that was refused, that part of it I agree is correct.

The Court: His statement now is that he asked to see it, he was refused and he has no recollection of his asking for the terms.

Q. (By Mr. Romley): Well, was there any other discussion then, Mr. Liberman, regarding this subject before Bob left Albuquerque?

A. Well, sure, there were—we talked about it and I told him the reasons why I didn't want to

(Testimony of Maurice Liberman.)

show it to him, about the conversations with Mrs. Nagel in New York, I repeated.

Q. All right. You tell us what you said to him now, sir, with regard to the reasons that you refused to show him the agreement.

A. The reasons?

Q. Yes, sir.

A. That I talked to Mrs. Nagel, I called Mrs. Nagel from New York, asked her to participate. She told me she wasn't interested, she released me and that I felt that I didn't have any obligation to her and that's the reason that I didn't want to show him the contract.

Q. And was the sole reason, is that right?

A. Yes, sir.

Q. That she released you?

A. That's right. [795]

Q. Now, was there a meeting later in Judge Johnson's office? A. Yes, sir.

Q. Is that the one—

Mr. Moore: Later when, Mr. Romley, that day or a later day?

Mr. Romley: I'm getting to that.

Q. (By Mr. Romley): It wasn't later that day, I didn't mean to imply that. A. No.

Q. I think your testimony is that on November 6th there was a meeting in Judge Johnson's office at which you, Mrs. Nagel, your brother, I think you said Bob Jenkins and Judge Johnson were present, is that right? A. Not my brother.

(Testimony of Maurice Liberman.)

Q. Not your brother, okay. All except your brother?

A. Mrs. Nagel, Mr. Jenkins, Mr. Cox, Judge Johnson and myself.

Q. Did, at that time, did Mrs. Jenkins or Bob Jenkins or Jim Cox ask again to see the agreement? A. Yes.

Q. Did you at first refuse to allow them to see it?

A. I don't recollect. I don't remember if I refused or not.

Q. You later in that conference did show them the [796] agreement, is that right?

A. Yes, sir.

Q. Was that at the suggestion or upon the advice of Judge Johnson?

Mr. Moore: We object to that as being wholly immaterial and irrelevant, if your Honor please.

The Court: No, he may answer.

A. Yes, sir.

Q. (By Mr. Romley): Then Mrs. Nagel and Bob and Jim Cox, one of them was handed the agreement, is that right, sir? A. Yes, sir.

Q. That's that November 6th agreement?

A. Yes, sir.

Q. They were excused and went into the library or some other room in Judge Johnson's office to read it alone, is that right, sir? A. Yes, sir.

Q. And you and Judge Johnson remained in his office? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. After some time the three returned to your office or to Judge Johnson's office?

A. Yes, sir.

Q. Mrs. Nagel said, "Maurice, you have made a good contract here," is that right, sir?

A. Yes, sir. [797]

Q. She says, "We want to exercise our option to buy"?

A. No, sir.

Q. She said, "We are ready, willing and able to buy"?

A. No, sir.

Q. She asked you if she could buy in?

A. No, sir.

Q. Well, what happened, did she just see it and say, "Thank you," and walk out after going to the trouble of seeing what the agreement provided?

A. Well, the discussion started again about the conversations from New York, and I told her again that I called her and gave her the opportunity to come in in accordance with our agreement, and I rehearsed the whole—it's like a record, I told her again the whole conversation.

Q. Why did you do that if she didn't tell you she wanted to come in?

A. She then—a discussion started that the way they understood our September 23rd agreement they had the right to come in up to April 30th.

Q. And they told you they wanted to come in?

A. They told—I understood from the conversation that they wanted to come in.

(Testimony of Maurice Liberman.)

Q. Then you did understand from what either Jim Cox, Mrs. Nagel or Bob Jenkins said that they wanted to exercise their option on January 6th, isn't that right? [798]

A. Not in that—not in such——

Q. Not in those words?

A. Those words, and not—the inference was they said that they had the right to come in up to April 30th, and that was mostly our discussion, it was a question of who was right.

Q. Did they tell you, sir, that they wanted to come in?

A. I can't recollect. It's possible.

Q. You don't deny it?

A. I don't deny it, no.

Q. But if they had—if they did say to you they wanted to come in or exercise the option, you would have refused to allow them to do so?

A. Yes, sir.

Q. And up to that time, do you know approximately how much timber had been cut after November 30th and before January 6th? A. No, sir.

Q. Would you say approximately two million feet at the most? A. I would say so.

Q. Now, do you remember how long this conference lasted in Judge Johnson's office, approximately?

A. Mr. Romley, I can give you the exact hours, I have them in my notes, I have notes of that conference.

(Testimony of Maurice Liberman.)

Q. Can you tell me approximately how long it was?
A. Not without looking at it. [799]

Q. You don't have any independent recollection?

A. Well, I would say maybe somewhere within an hour or two hours.

Q. And when Mrs. Nagel, Mr. Cox and Mr. Jenkins left were they still insisting that they had the right to exercise the option?
A. Yes.

Q. And you were still denying that, is that right, sir?

A. I told them that I gave them the opportunity.

Q. Then was it left that there would be some further discussions between the parties?

A. Yes, sir.

Q. Then there was some correspondence between Jim Cox and Judge Johnson?
A. Yes, sir.

Q. You have seen that correspondence?

A. Yes, sir.

Q. And there was a meeting in March, I believe, March 8th, is that right?
A. Yes, sir.

Q. The same parties were present except that Mrs. Nagel was not there and was your brother there at that time?

A. It's easier for me to recollect.

Q. All right, tell me who was there?

A. Mr. Cox and Mr. Jenkins, and from our group Judge [800] Johnson, Joe and myself.

Q. At that time were Mr. Jenkins and Mr. Cox still insisting on their right to exercise the option?

(Testimony of Maurice Liberman.)

A. As far as I recollect, most of the conversation was in relation to letters that Mr. Cox had written to Judge Johnson, and it related to some settlement.

Q. At that time did Jenkins say or Cox say that the Nagel Company wanted to exercise its option?

A. Not in that many words.

Q. Well, did they say that in effect?

A. Well, they said that they thought they had the right to come in up to April 30th, but most of the conversation as far as I can remember now was a question of the settlement and the letters, a letter that Mr. Cox had written to Judge Johnson.

Q. Did you at that time refuse the Nagel Company the right to exercise the option?

A. I don't remember if it came up.

Q. If it did come up and you don't recall, you say, would you have refused it or would you have agreed that they could?

A. I would have refused.

The Court: We will take the afternoon recess at this time. [801]

(Short recess.)

After Recess:

Q. (By Mr. Romley): Mr. Liberman, I hand you Plaintiffs' Exhibit 17 for identification and Plaintiffs' Exhibit 14 for identification. These are the two volumes comprising your deposition, are they not? A. Yes, sir.

Q. I believe you said you have read those depositions? A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And you signed the last volume on the last page, did you not? A. Yes, sir.

Mr. Romley: We offer these depositions of an adverse party, your Honor.

Mr. Moore: What were the Exhibit numbers?

Mr. Romley: 14 and 17.

Mr. Moore: You mean you are offering the entire deposition?

Mr. Romley: Yes, sir. I was accused of taking something out of context.

Mr. Moore: I have no objection.

The Court: They may be received.

(Plaintiff's Exhibits 14 and 17 marked in evidence)

Mr. Romley: That is all. [802]

Redirect Examination

Q. (By Mr. Moore): Mr. Liberman, Mr. Romley asked you about your negotiations with Mr. Gallagher with reference to mergers and so forth. Had you had some discussion with Mr. Gallagher about that situation back sometime after, about the time of the purchase of the Aztec timber?

A. About merger? No, sir.

Q. When was the first time after the purchase of the Aztec timber you had discussion with Mr. Gallagher about mergers or the Winslow operation?

A. I would say at the beginning of May, '58 and on.

Q. From that time on at various times?

(Testimony of Maurice Liberman.)

A. Yes, sir.

Q. Up to the fall of '58. Mr. Romley asked you, Mr. Liberman, about your intentions with respect to operating the mill, if you bought it under the September 12 proposal, and the running of the timber and your intentions with respect to the operation of the mill when you were talking to Mrs. Nagel on the 20th. Let me ask you the question in this way. Did you have any idea, or what were your ideas or thinking with reference to running your timber through the mill in the event you acquired the mill?

A. Of course, when I wanted to acquire the mill it was to use it to run our timber. [803]

Q. What were your plans, if any, with respect to what timber would go through the mill and upon what basis it would go through the mill in the event that you and Mrs. Nagel bought it together?

Mr. Romley: I object unless those intentions were expressed to Mrs. Nagel.

The Court: You went into this, Mr. Romley. He may answer.

A. We didn't have any understanding what we were going to do with the timber.

Q. (By Mr. Moore): Is that one of the things you said you would have to discuss and work out if you bought it together? A. Yes, sir.

Q. Mr. Romley asked you in some detail about your negotiations on October 8th—first, let me back up and get this in chronological order. He asked

(Testimony of Maurice Liberman.)

you first about your conversation with Mr. Gallagher and your telephone conversations with Mr. Jack Kaplan on September 11th when you were discussing this September 12 proposal that we have talked about with respect to the first refusal arrangement they had with the Nagels. Will you tell us, please, what Mr. Gallagher said about that and what Mr. Kaplan said about it and give us the substance of your conversation with Mr. Kaplan. [804]

A. I had talked in the early morning with Mr. Kaplan from my home on the 12th—

Mr. Romley: I object to the conversation the early morning from his home. I did not go into that subject. I did go into the subject of the conversation from Mr. Gallagher's office.

Mr. Moore: I believe that came out in response to a question that you talked to Mr. Kaplan first and then talked to Gallagher and then talked to Kaplan again. That is my recollection, if the Court please.

Mr. Romley: He did say he talked to him, but I did not go into that conversation at all, nor did he testify except to say he had talked to him that morning.

The Court: There was something said about Mr. Gallagher's conversation with Mr. Kaplan while this witness was present.

Q. (By Mr. Moore): Let's limit it then, Mr. Liberman, to the conversation you had with Mr. Gallagher and what you heard of Mr. Gallagher's conversation to Mr. Jack Kaplan, and your con-

(Testimony of Maurice Liberman.)

versation with Mr. Jack Kaplan, then you handed the receiver back to Mr. Gallagher. Was that on the 12th? A. Yes, sir.

Q. That was on the 12th. I had the wrong date.

A. Yes, sir.

Q. Give me the substance if you can of those conversations [805] that you heard and had with respect to what was said and the question of this first refusal arrangement.

Mr. Romley: Your Honor, is it the understanding this relates to the conversation from Gallagher's office?

Mr. Moore: Yes. I will limit it to the conversation you had with Mr. Gallagher in his office and the conversations with Mr. Jack Kaplan by telephone from Mr. Gallagher's office on the 12th. Now, is the question clear to you? A. Yes, sir.

Q. (By Mr. Moore): All right.

A. In our proposition and the proposition, the draft, let's call it the first draft, that Gallagher gave me the 11th. There was a down payment of \$100,000 on the deal. I called Mr. Kaplan from my home——

Q. No. A. I am sorry.

Q. Mr. Liberman, I am not interested, because that would be hearsay and Mr. Romley didn't open that gate, with respect to your first telephone call to Mr. Kaplan. Limit it to your conversation with Mr. Gallagher and your conversation by telephone with Mr. Kaplan from Mr. Gallagher's office.

(Testimony of Maurice Liberman.)

A. Well, Gallagher called Kaplan to verify that he agreed to modify the terms. In other words, instead of \$100,000 down it was \$500,000 all credit, and that was one of the important modifications in the proposal. And Gallagher [806] read the whole thing to Jack Kaplan with the corrections we agreed to. During that conversation there was a conversation between Kaplan and Gallagher about the first refusal. I didn't hear what Kaplan said.

Q. What did you hear Mr. Gallagher say?

A. Mr. Gallagher said that he would take care of it and will get Mrs. Nagel to give up the first refusal.

Q. Did you have some discussion with Jack Kaplan during that conversation?

A. Yes, afterwards. Mr. Kaplan congratulated me and said: "You had a deal, as far as the first refusal, I am not committed to it, I don't consider we have any commitment, I have talked to Mrs. Nagel about the merger when I was out there, but let Tom Gallagher handle it the way he wanted, he will take care of it. But you have a deal, good luck to you, congratulations, I am happy you got the deal."

Q. That was on September 12th?

A. Yes, sir.

Q. Now, after that date we have determined the September 18th call you had from Mr. Cavanaugh?

A. Yes, sir.

(Testimony of Maurice Liberman.)

Q. And then your September 20 conference with Mrs. Nagel and Mr. Jenkins, we have already gone over that. And I believe that you said the next time you talked to Mr. Gallagher and Mr. Romley asked you about these negotiations [807] and these conversations, was October 8th, 9th and 10th, those dates. Does that direct your attention to the conferences I have in mind? A. Yes, sir.

Q. Where did the first meeting take place?

A. In my office.

Q. And who was present?

A. Mr. Gallagher, Tom Gallagher, Bob Gallagher and Yale Weinstein and myself.

Q. Was that the first meeting you had with Tom Gallagher after you had seen him on the 12th of September? A. Yes, sir.

Q. Just relate for us the substance of that conference.

Mr. Romley: That, if your Honor please, is based on hearsay, is hearsay.

Mr. Moore: Mr. Romley opened it and went into all those negotiations of the 8th, 9th and 10th, questioned him at length about them and the various proposals that were made, one to the other.

The Court: The 8th, 9th and 10th——

Mr. Moore: Of October. Read from his deposition with respect to proposals that were made with respect to buying it together, he and Gallagher.

The Court: He may answer.

(Testimony of Maurice Liberman.)

Q. (By Mr. Moore): Give us the substance of that conference, [808] that first one you mentioned, Mr. Liberman.

A. They came in and Mr. Tom Gallagher——

Mr. Romley: May I inquire on voir dire, if your Honor pleases?

The Court: Very well.

Voir Dire Examination

Q. (By Mr. Romley): When I examined you, Mr. Liberman, with regard to the offer made either by you to Gallagher or Gallagher to you, which you accepted, as you said on a fifty-fifty basis, was that conversation on the occasion you are just about to relate, or was that on a different day?

A. A different day.

Mr. Romley: I object, if your Honor please. I think perhaps I have opened the door on one. I think he said it was at his apartment that Gallagher called him, that is my remembrance. Now he is about to relate something that occurred in his office that I did not go into.

Mr. Moore: Let me ask one question.

Q. (By Mr. Moore): Were the negotiations that Mr. Romley asked you about a part of a series of negotiations on the 8th, 9th and 10th of October?

Mr. Romley: I object to that as leading and suggestive. He has already said it was on another occasion. [809]

(Testimony of Maurice Liberman.)

The Court: The only purpose would be in order to make it complete, if it has been entered into. I don't know. The depositions are in evidence now. Is it in there, if it is probably you have the whole thing.

Mr. Moore: It is in there in minute detail and Mr. Romley asked him about this, your Honor.

Mr. Romley: They are all in evidence.

The Court: He may answer.

Mr. Moore: It has been asked and answered Mr. Romley says.

Mr. Romley: It is in evidence.

Q. (By Mr. Moore): Now, Mr. Liberman, if you remember the question let's start with the first conference you had and give me the substance of it with Mr. Gallagher and others you mentioned at the first meeting on October 8th?

A. Mr. Gallagher came in with the other two gentlemen and told me they have bought all of Kaplan's properties.

Q. Did he tell you who "they" meant?

A. Yes.

Q. Who?

A. A group of Tom Gallagher and Bob Gallagher, Yale Weinstein, Tom Cavanaugh and Charley Wickens.

Q. Was that group of Weinstein, Cavanaugh, Bob Gallagher and Wickens to your knowledge associated with or employed by either New Mexico Timber or Arizona Timber Company? [810]

(Testimony of Maurice Liberman.)

A. Yes, sir, they were officials of the company.

Q. All right, proceed.

A. And that they were negotiating with a bank in Phoenix, I don't know if it was the Valley National Bank—they mentioned the name of the bank—and that they are going to obtain the money and make the deal. That they would like for me to continue with them with the milling. I am shortening the whole thing.

Q. That is what I want you to do.

A. Of course this is a complete surprise to me, and so forth. I told Mr. Gallagher about it. I said, "What about the proposal I signed, the proposal that you made to me and I signed and I gave you a check and you still have the check?" He used the expression, "that is spilled milk, forget about it, that is no more now, we bought all the properties." So I got a little bit excited, I told him, "as far as I am concerned I have no commitment with you, this is a breach of our contract of all of our agreements and I would like to go and see the Kaplans in New York." He blew up and started to get very obnoxious and so forth and I told him that I wasn't used to such language and asked him in so many words to leave the room. And that was the substance of that conversation.

Q. When was the next time you met with them and tell me who was present?

A. The next time he called me up in the [811] morning.

(Testimony of Maurice Liberman.)

Q. Which day was that? This first one I believe you said was on the 8th. A. The 9th.

Q. Was the first one on the 8th we just talked about?

A. That was on the afternoon, evening of the 8th.

Q. The next morning on the 9th Mr. Gallagher called you? A. Yes, sir.

Q. Did you meet Mr. Gallagher?

A. Yes, sir.

Q. Where did you meet him?

A. He called me and asked me to come over to his apartment.

Q. Did you go over there? A. Yes.

Q. Did you have any further discussion with him there? A. Yes, sir.

Q. Give us the substance of that. First, was there anyone present other than you and Mr. Gallagher? A. No, sir.

Q. Give us the substance of that conference?

A. Well, he referred back to what he told me the previous evening and we got again to rehash the conversation. I told him I had an agreement with him. We signed the proposal. He told Cavanaugh to call me and tell me the deal was off, but still in my mind I considered I had some kind of a [812] commitment from Kaplan. And we kept on arguing. During the arguments he told me that, that it finally came out he had an understanding with the Kaplans that he hadn't bought the property. He said, "I don't want you to go to New York, you

(Testimony of Maurice Liberman.)

are going to spoil all my deal," something to that effect, "I have yet to get money from the banks," and then he called his secretary and asked her to bring over the file, the correspondence file between him and the Kaplans. When she came back she showed me some wires that he had sent to Kaplans and letters.

Mr. Romley: Just a moment. I object to the contents, if your Honor pleases, as not the best evidence.

Mr. Moore: I don't have the best evidence, Mr. Romley. Those are not available to us.

Mr. Romley: Yes. Still it isn't the best evidence.

The Court: He hasn't mentioned the contents, just said she showed him some wires.

Q. (By Mr. Moore): Without giving us the contents of the wires and letters, go ahead and tell me what happened and what was said.

A. Then he referred to the visit of Mr. Jenkins on the 23rd; that Mr. Jenkins told him that I went there to Winslow to coerce him and scared him to buy the mill from Gallagher. And of course I denied the thing, it wasn't correct. And he said that was the reason why he got so mad against me [813] and he called me a blackmailer and corruptionist, all kinds of things. We kept on discussing and I don't remember who made the proposition, we got back to this purchasing of all of Gallagher's properties on a fifty-fifty basis.

(Testimony of Maurice Liberman.)

Q. When you say all the Gallagher properties, are you referring both to New Mexico and Arizona, or just Arizona?

A. No, all of them, New Mexico, Arizona and some land up there, everything.

Q. All right. What else happened?

A. Well, during that conversation I related a while ago to Mr. Romley we got to talking about this fifty-fifty proposition.

Q. Now, with reference to that fifty-fifty proposition, was there anything said by Mr. Gallagher as to whether they had the financing or whether it had been submitted to the Kaplans, or anything with reference to that?

A. Oh, yes. He showed me wires from the Kaplans where they said——

Mr. Romley: I object to the contents.

Q. (By Mr. Moore): What did he say to you?

A. That he needed a million two hundred thousand dollars cash to be paid by a certain date.

Q. That Gallagher did?

A. Yes. The Kaplans told him they would accept a deal——

Mr. Romley: Just a moment, if your Honor please, we [814] are getting into hearsay—not hearsay, but contents of documents that are not in evidence.

Q. (By Mr. Moore): Are you limiting yourself, Mr. Liberman, to what Mr. Gallagher said to you?

A. I will try to.

No. 17642

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Appellants,

vs.

GEORGE H. NAGEL, ET AL,
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In Four Volumes

VOLUME III.
(Pages 969 to 1464, inclusive)

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(Testimony of Maurice Liberman.)

Q. All right. Leave out what you saw in any wires or letters and abbreviate it, give me the substance of it, what Gallagher said to you about the financing, what they had to have and whether the deal had been submitted to the Kaplans and so forth.

A. It was a four million dollar deal and they had to pay one million two hundred thousand dollars cash at a certain date, within a number of days, two or three days, something like that. That he saw the banker and supposed to see some banker in Albuquerque too but didn't have yet the money, but he expected he could get it. He wanted us to go on with the milling agreement, he was coming back to us. And that was about——

Q. What did you say to him about the going on with the milling agreement?

A. I told him no, that I had a deal and if all—that all our agreements, I felt I was free from all our commitments.

Q. Did you have any discussion with him about whether you considered he could assign that milling contract to somebody else? [815]

A. Yes, sir.

Q. What did you say to him about that?

A. That he couldn't.

Q. What did he say to you about that subject?

A. Well, he thought that he could.

Q. Is that the substance of the conference you had on the 9th of October?

(Testimony of Maurice Liberman.)

A. Well, then at the end he was supposed to consult with the group that I mentioned to you.

Q. That is the same group you named a moment ago?
A. Yes.

Q. Wickens and the others?

A. That's right, to give me an answer.

Q. He was getting you the answer after talking to his group. Did that still apply to all of the properties or had you eliminated some of the properties by that time?

A. No, sir, it was to both propositions.

Q. Now, does that give us the substance of the October 9th meeting?

A. With Gallagher in his apartment, yes.

Q. When was your next session with respect to these negotiations we are talking about?

A. In the afternoon, around two o'clock the same day.

Q. Where did that occur?

A. In my office. [816]

Q. Who was present?

A. Bob Gallagher, Yale Weinstein, Tom Cavanaugh and Charley Wickens.

Q. What was the substance of that conference?

Mr. Romley: Just a moment, if your Honor pleases, I object to that. Tom Gallagher, with whom the negotiations were being carried on is not shown to be present. Conversations with other parties is hearsay.

Mr. Moore: The others are the group he was negotiating with and it is the same negotiations.

(Testimony of Maurice Liberman.)

Mr. Romley: Asked about?

The Court: No, the objection is sustained.

Q. (By Mr. Moore): When did you next meet with Tom Gallagher?

A. I think the next meeting was in New York.

Q. You didn't see Tom Gallagher then on the 10th?

A. He called me.

Q. He called you? A. Yes. [817]

Q. Did he call you about these negotiations you have been talking about? A. Yes, sir.

Q. Give us the substance of that conversation?

A. Well, I—during that conversation I told him that I was going to New York and he told me not to go to New York, to give him two days, that he wants to let things—if I may use the expression—to put things on ice, to let things settle and that he will come up with some proposition that will be satisfactory to all parties concerned. And I told him that I—my main thing of going to New York was to see the Kaplans and clear up my name, they were my friends and he meant, he told them things about me that were absolutely false and I was going.

Q. And then you did go to New York?

A. Yes, sir.

Q. Now, let me back up to another matter that Mr. Romley asked you about. He asked you about the negotiations with respect to the September 12th letter proposal, and if certain statements therein with respect to 14,000 feet of timber were true,

(Testimony of Maurice Liberman.)

and if you made any objections to them and your discussions about them—14,000,000 feet?

A. That's right.

Q. Now, when you first met with Tom Gallagher on September—was that the 10th or 11th, I get the dates confused. [818]

A. The first time the question of the Winslow plant came up was October the 10th.

Q. No, I'm talking about the proposal.

A. September the 10th, excuse me.

Q. September the 10th?

A. I'm getting confused too.

Q. September 10th you met with Tom Gallagher?

A. Yes, sir.

Q. Did you have some discussion with Tom Gallagher at that time with respect to the amount of timber that had been cut under your pooling agreement?

A. I don't remember if it was that—yes, it was that day.

Q. And did you have any discussion with Tom Gallagher with respect to whether they wanted timber to balance up the account or they wanted money to pay the account?

A. Well, first we discussed money that I will pay him in money for the amount of timber that, after liquidating—rescinding the pooling agreement, determining the footage that was cut, that I would pay him in money for that.

(Testimony of Maurice Liberman.)

Q. You say first you discussed that, let me ask you, did Bob Gallagher come into the discussion on that particular subject later?

A. Yes, sir. [819]

Q. And what occurred then?

Mr. Romley: Just a minute, later you mean in September 10th?

The Witness: Yes.

Mr. Moore: That's what we are talking about.

A. Yes, sir.

Q. Now, did you have further discussion with Tom Gallagher and Bob Gallagher about this 14,000,000 feet after Bob Gallagher came into the scene?

Mr. Romley: Now, again I don't want to appear technical, your Honor. But you say later, you mean the same conference?

Mr. Moore: I mean that same day, Mr. Romley. The witness told you it was the same day.

Mr. Romley: Well, then, you asked him another question, Mr. Moore.

A. When he told us, when Gallagher told us that our negotiations about the mutual purchase of all properties, after he told me that and we started to discuss the——

Q. (By Mr. Moore): I'm talking about September 10th. A. I will get to it.

Q. All right, maybe I'm confused.

A. You are confusing me because I want to go the way I remember it. We started to talk about the Winslow plant and the timber, we talked about

(Testimony of Maurice Liberman.)

the pooling agreement and that I will pay him in cash. At that point he called in Bob and [820] Charlie, Bob Gallagher and Charlie Wickens and told them that we are discussing the purchase of the Winslow properties and what they—well, he didn't consult with them, he told them that he is going to proceed with the instructions from Kaplan, or so with the ideas of liquidation, and told them that we are buying the timber and the mill. So Bob Gallagher said, "Well, what is going to happen to us with all our sales organization? We have seven salesmen, outside salesmen stationed in the southwest." And he enumerated fellows, he got kind of mad or so, and, "Do you want me to—what are you going to do? We will have a terrific overhead, we will have only the properties, the lumber from New Mexico."

Q. Now, were you talking about this 14,000,000 feet of lumber or cash at that time, is that the subject?

A. That question, the fourteen—the cash payment for the 14,000,000 feet was already agreed to, and then Tom said, "Maurice, would you be willing to pay us back in lumber instead of paying us cash, and that will keep the boys going and busy until we retract," or not retract, "curtail our force," or something to that effect. And I told him yes.

Q. And that's the reason you didn't object to the 14,000,000 feet of lumber referred to in the letter proposal that Mr. Romley asked you about?

(Testimony of Maurice Liberman.)

A. That's how this 14,000,000 feet came in, that we were going to handle it for them, see. [821]

Q. And then when ultimately you made your negotiations in New York you went back to the money instead of the lumber, is that correct?

A. Yes.

Q. Now, Mr. Romley asked you, Mr. Liberman, if on September 20th you knew that the Nagels were not going to negotiate for the purchase of the Winslow mill. How did you know that?

A. Well, the 18th when I called Mrs. Nagel and asked her if she bought the mill, or something to that effect, she told me no, and says, "Not ready—" she used the word about. She is not about to buy it, she said she—for financial reasons.

Q. And then in your discussions on September 20th you have related her conversation that they were not going to buy and the financial arrangements and so forth, you have already told us about that?

A. Yes, sir.

Q. Is that the reason you answered Mr. Romley that you knew that the Nagels were not going to negotiate for this property?

A. Yes, sir.

Q. Now, Mr. Romley asked you, Mr. Liberman, about the addition—he called it a change, or an addition, either one, to the September 23rd letter where it contains the provisions with respect to the six months extensions, that that was not discussed in Winslow. Tell me why that was put in the letter? [822]

(Testimony of Maurice Liberman.)

A. Well, I told, I related to my brother, Joe, the main items of our conversation on September the 20th. And I told him that we fixed the date of April the 30th, and I said, or suggested that we didn't know at what time, when we would have an offer or when we were going to get an offer from Gallagher, a proposition from Gallagher, if it would be April the 30th or later, or from my experience, the best experience in any negotiations with him, and the last experience that I had with him with making a deal and calling it off and so forth, so I told him, "Let's make it a binding, a binding agreement that at any time either of us would get a proposition from Gallagher that we will have the opportunity to participate."

Q. And when you say "either of us would get a proposition from Gallagher, the other would have the right to participate," who did you mean by "either of us"?

A. Either Mrs. Nagel or Duke City Lumber Company.

Q. Now, on September 20th when you met in Winslow, I believe you have told us that Mrs. Nagel had some sheets with information about the Winslow mill of the Gallagher companies?

A. Yes, sir.

Q. And you had had some discussion with her, I believe, about her talking to the bank or her banker about money to arrange the financing of it, or did you discuss that in your September 20th meeting?

(Testimony of Maurice Liberman.)

A. Well, we didn't discuss it, she told me—she related [823] to me that she has contacted the bank, and I don't know exactly the words she told me. But she couldn't arrange for the financing, couldn't get the cash that this purchase would need and that it was too much of a burden for her, and she wasn't interested and she was going to tell Gallagher.

Q. Was there anything in the conversation that you had on the 18th or on the 20th that caused you to believe that Mrs. Nagel did not have full and complete information about this mill, the properties or the operation there?

Mr. Romley: Just a moment, I object to that as being too all-inclusive and calling for a conclusion, your Honor, as to something in the mind of a third person.

Mr. Moore: No, something he knew because you asked him about this New York call and what he could do in two hours, and I want to get to that.

The Court: May I have the question, please?

(Whereupon, the pending question was read by the reporter.)

Mr. Moore: Wait until the Court rules.

The Court: He may answer.

Q. (By Mr. Moore): Go ahead.

A. Mrs. Nagel was very familiar with the mill and—the Gallagher mill. She knew it better than I do. She knows it right now better than I do.

(Testimony of Maurice Liberman.)

Q. And when you called her from New York did you say that [824] she knew the Gallagher mill in Winslow better than you did?

Mr. Romley: Just a moment, your Honor, I think that's leading and suggestive. I think a certain amount is all right, how far are we going?

The Court: Objection sustained.

Q. (By Mr. Moore): Now, Mr. Liberman, Mr. Romley asked you about this—he said Gallinas, is that the right name of that mill? A. Yes, sir.

Q. And that was an eight or ten million feet capacity operation. A. Yes, sir.

Mr. Romley: I think he said about eight million.

Mr. Moore: Eight to ten, I think he said.

A. At that time eight, eight to ten.

Q. (By Mr. Moore): And you said that was a profitable operation? A. Yes.

Q. Is that a similar mill and equipment and so forth that you have in Winslow in your operation up there? A. No, sir.

Q. On the 16th of October when you called Mrs. Nagel from New York, either in the first or in the second call that you related, did she ask you for more time to consider the matter than to give you an answer within a few minutes thereafter? [825]

A. No.

Q. Did she make any complaints to you about the shortness of the time that was left between the time of your call and when you told her you had to make a commitment to the seller? A. No.

(Testimony of Maurice Liberman.)

Q. She made no complaint at all about that in your conversation?

Mr. Romley: Just a moment, that's been asked and answered.

Mr. Moore: In the first two?

Mr. Romley: That's been asked and answered.

A. No, sir.

The Court: Objection sustained.

Q. (By Mr. Moore): In the third call you had with her, the third conversation you had with her by telephone from New York did she make any complaint in that conversation about the fact that you hadn't given her enough time to consider?

A. No, sir.

Q. Did she ask for more time? A. No, sir.

Q. But you did tell her you'd give her 48 hours additional time to consider it and maybe she'd change her mind, or words to that effect?

A. Yes, sir.

Mr. Moore: I believe that's all. [826]

Mr. Romley: Just a moment, sir.

Recross Examination

Q. (By Mr. Romley): Now, you were anxious at all times, if you did not buy the Gallagher properties, to have your Aztec timber milled in the Gallagher mill, were you not? A. Yes, sir.

Q. So when you said that Tom Gallagher, I believe it was on the 9th of October, spoke to you about going on with the milling agreement you

(Testimony of Maurice Liberman.)

said no. You didn't mean no, did you? You had to have your timber milled, didn't you?

A. I said that I wanted to see Mr. Kaplan to find out what happened to our September 9th—September 12th agreement.

Q. You say that you had no understanding with Mrs. Nagel as to what would be done with your timber if you bought the mill together?

A. That's correct.

Q. You expected it would be milled through that mill, didn't you? A. Yes, sir.

Q. You expected to pay for it in being milled, didn't you? A. Well, reasonable, yes.

Q. You didn't expect to get that done for free, did you? A. That's correct. [827]

Q. You would either have to pay for it under the milling agreement or it would be milled the same as any other timber and sold, wouldn't it?

Mr. Moore: We object to that, if your Honor please, as calling for a conclusion, getting into matters that were not negotiated or discussed in this case.

The Court: The objection is sustained.

Q. (By Mr. Romley): You say this Gallinas mill is not similar to the Duke City mill at Winslow? A. No, sir.

Q. Do you know from these exhibits that have been received in evidence that the Nagel mill made substantial sums of money, I think it's Exhibit 10, when it was operating a twelve, ten, twelve and thirteen million capacity?

(Testimony of Maurice Liberman.)

Mr. Moore: Now, we object to that, if your Honor please.

Mr. Romley: Well, I will withdraw the question, it's there. That's all.

Mr. Moore: That's all, Mr. Liberman.

The Court: That's all.

Mr. Moore: Mr. Weinstein. [828]

YALE WEINSTEIN

recalled as a witness herein, having been previously duly sworn, testified further as follows:

Further Direct Examination

Q. (By Mr. Moore): Mr. Weinstein, generally what was the condition of the mill and equipment of Arizona Timber Company in Winslow prior to its delivery to Duke City under the contract of purchase in this case?

A. Mr. Moore, I think I would have to answer that comparative on the basis of the standard that we have put the mill, the condition that we have put the mill into.

Q. Answer it any way that you need to.

A. Today. Perhaps best be answered, Mr. Moore, by the fact that after the mill was acquired by Duke City Lumber Company—

Mr. Romley: Just a moment, if your Honor please, I submit that this is not responsive. He has just been asked generally what was the condition of the mill at the time of the purchase.

(Testimony of Yale Weinstein.)

Mr. Moore: I think that's proper, Mr. Romley.

Q. (By Mr. Moore): What I want to get—

A. I would say—

Q. Now, wait a minute, what I want to get is a foundation [829] to start, what the condition of it was, whether it was in A-1 mechanical condition or whether it was in need of repairs or—

A. It was in need of repairs, sir.

Q. That's what I wanted to get. Now, can you tell me specifically what parts of it were in or illustrate some of the items, the major items that were in need of repairs?

A. I believe the first matter that came to our attention that was in need of repair were our dry kilns, we at that time were producing certain grades of molding and other grades of shop, cut stock which went to our own plant in Albuquerque and it immediately became apparent that we were having a dry kiln condition, we are having the resultant case hardening and we immediately solicited the aid and the assistance of the Western Pine Association dry kiln technicians to help us in the solution of the problems. I can recall that in this particular problem which presented itself as a formidable one we had solicited information from the dry kiln manufacturers as to what the costs might be for recommendations that they would make to improve the quality of the performance of the work. We had problems insofar as the condition of the machinery and the planing mill.

(Testimony of Yale Weinstein.)

Q. Did you have to make repairs to the dry kilns in order to get a job done?

A. We did, we had to make repairs and——

Q. After the repairs were made, are the dry kilns now in [830] satisfactory condition to do the job that Duke City wants done up there?

A. No, sir.

Q. And are you considering the replacement of the kilns?

A. After careful consideration, we feel that that is the only solution to our problem to get an adequate, satisfactory job of dry kilning. We will—— it will necessitate the installation of new kilns.

Q. Have you had quotations or someone for the company that you know of had quotations from manufacturers as to the cost of replacements with a proper kiln in lieu of the ones that are there?

Mr. Romley: Just yes or no, please.

A. Yes.

Q. (By Mr. Moore): We have copies of those here?

A. We do, sir.

Q. Would you get them for me?

Mr. Romley: I submit, if your Honor please, they are hearsay, there is no need to take time to get them.

Mr. Moore: Well, apparently you are going to object to——

Mr. Romley: No.

Q. (By Mr. Moore): Tell me then, Mr. Weinstein, what will be the probable cost to Duke City

(Testimony of Yale Weinstein.)

for the replacement of the two kilns that are now in existence? [831]

Mr. Romley: We object to that, if your Honor pleases, for it's necessarily based on hearsay.

The Court: He may answer.

Mr. Romley: May I inquire on voir dire, your Honor?

The Court: Very well.

Mr. Romley: Is your testimony, if you are to give any now, with regard to that based on the quotations that were given you?

A. Based upon the quotations given and conversations that I have had with representatives of dry kilns.

Mr. Romley: We renew our objection, your Honor.

The Court: No, he may answer. This, on both sides, profits are necessarily a matter of estimates. You can't know, neither can you know with exactness what you may have by way of expenses and I think that in both cases, as long as a person has some reasonable basis for these figures, they should be received.

Mr. Moore: Your Honor, we have those quotations if they would be better, I will get them and have them marked.

The Court: You may do it if you wish. I think the witness may speak from memory if you desire.

The Witness: The quotations are in my bag there, Mr. Moore. I believe they are in an envelope marked "kilns."

(Testimony of Yale Weinstein.)

Mr. Moore: If the Court will give us just a couple of moments we will get these. [832]

The Court: Due to the hour maybe we'd just as well get them out and have them ready in the morning. It's almost 4:30. We will recess until 9:30 in the morning.

(Whereupon, a recess was taken from approximately 4:20 o'clock p.m. on May 10th, 1960, until 9:30 o'clock a.m. on May 11th, [833] 1960.)

May 11, 1960, 9:30 O'Clock A.M.

Mr. Moore: Your Honor, I have two other witnesses I would like to proceed with before I continue with Mr. Weinstein.

Mr. Romley: I have no objection.

The Court: Very well.

Mr. Moore: Mr. Hickman, please.

LYLE HICKMAN

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): Will you state your name, please, sir? A. Lyle Hickman.

Q. Where do you live, Mr. Hickman?

A. Portland, Oregon.

Q. What is your occupation?

A. I am a dry kiln consultant for the Western Pine Association, a research engineer is the title given me.

(Testimony of Lyle Hickman.)

Q. What is the Western Pine Association?

A. It's an association that's owned by several mills in the west. It has control of their—it supervises the grades, promotion and product development and seasoning. [834] We have a laboratory that has the product development and seasoning consultant work.

Q. Are the plaintiff in this case, Nagel Lumber & Timber Company, and the defendant, Duke City Lumber Company, both members in good standing of the Western Pine Association?

A. As far as I know they are in good standing. They are members.

Q. Both members at any rate. What has been your experience, Mr. Hickman, in the operation and study of dry kilns?

A. I operated kilns for about in the neighborhood of 20 years, that is about 1929 up until five years ago. The Western Pine invited me to join their staff, the Association as a dry kiln consultant.

Q. And you are now employed as a dry kiln consultant or research engineer in that department?

A. Yes.

Q. For the Western Pine Association?

A. Yes.

Q. Did you, day before yesterday, inspect the two dry kilns of the Duke City Lumber Company in Winslow? A. Yes.

Q. Tell me briefly, Mr. Hickman, what types of kilns those are?

(Testimony of Lyle Hickman.)

A. One of them is a Reese, made by the Reese Company. [835]

Q. How do you spell that?

A. It's R-e-e-s-e, and it's a Bloxham.

Q. Bloxham? A. Bloxham.

Q. What is the bloxham kiln, describe that structure, what kind of unit it is?

A. The building is built of reinforced, or it's built of light aggregate—it's a steel structure, steel web structure and it's filled in, the walls are filled in with a light aggregate concrete. But the fans are underneath, the fans for circulation. It's a direct fire kiln, we call it direct fire.

It's where the combustion—the products of the combustion go directly into the kiln charge with the lumber, so we call them direct fire kilns.

Q. Now, describe the other one for us, the Reese, I believe you said?

A. Yes, it's a web, steel web construction with metal panels, metal and fiber glass insulation within a metal, the metal panels are soldered, they are eight by—approximately eight by four feet panels. They are set into this web sealed with neoprene gaskets.

Q. What type of heat, if that's the proper term, is used in the Reese?

A. It's also a direct fire kiln.

Q. And what is the other kind of heat used in kilns [836] other than direct fire?

A. Most of the kilns, the majority of the kilns use steam heat.

(Testimony of Lyle Hickman.)

Q. And that is steam conducted through pipes or radiators or something within the structure?

A. Yes, the steam is used for the heat transfer.

Q. You say most—— A. Radiant heat.

Q. You say that most of the kilns in operation use steam heat?

A. In our area most of them are, I'd say 90 per cent of them are.

Q. What is the purpose of a dry kiln in the treatment of lumber?

A. It's to accelerate the drying of lumber.

Q. And in that process of drying a proper kiln operation does it also condition the lumber?

A. It must be conditioned to be properly good, lumber has to be conditioned.

Q. How is the conditioning done?

A. After the lumber is dried to the required or desired moisture content, steam or high humidity conditions are set up within the chamber for different lengths of time, the required time to do the job, very high humidity conditions.

Q. And that's what you call the conditioning of the lumber? [837]

A. Yes, that's to—it softens the surface area and relieves the internal stresses within the lumber.

Q. Within the boards themselves you mean?

A. Yes, within the boards themselves.

Q. It relieves the internal stresses. Does the treatment of the lumber in the dry kiln, the conditioning I believe you said, affect the quality of lumber that comes out of that dry kiln?

(Testimony of Lyle Hickman.)

A. Well, I don't—it doesn't affect the quality, it makes it—it would be difficult to manufacture if it wasn't conditioned because the internal stresses show up in the remanufacturing, they are not—

Q. That's what I mean.

A. They don't run straight and true through the machine.

Q. That's what I mean, if it's not properly dried—

A. It has to be properly—

Q. —dried and conditioned then the remanufacture of it does the—does that affect the quality with respect to remanufacture?

A. Yes, that's right.

Q. Now, did you pick up some samples of the lumber that came out of the dry kilns at Duke City Lumber Company at Winslow?

A. I picked up some lumber in their storage sheds. [838]

Q. And when you did that what did you do with it?

A. I took them to a cabinet shop and had them, what we call case hardened samples made out of them, in other words case hardening samples.

Q. Case hardening samples? A. Yes.

Q. Do you have those with you? A. Yes.

Q. May I see them, please?

A. These got broken on the trip in handling, but they will demonstrate the effect.

Q. Speak just a little louder, Mr. Hickman.

(Testimony of Lyle Hickman.)

A. Pardon me. These were broken on the trip down here due to handling and the effect—they will still demonstrate the effect.

Q. Do these two go together?

A. Yes, that was a straight, natural board, what we call natural is before you resaw. [839]

Q. Mr. Hickman, you said these two I am handing you, I don't know whether they have a number on them.

A. I marked one "1" and one "2" because two of these are from the same board and another one from a different board. This—does that have a number "2" on it?

Q. Looks like a number "2" here. A. Yes.

Q. Let's take this part of number "2." Will you just take those two pieces of board and explain and demonstrate to the Court what those indicate with respect to proper conditioning or improper conditioning and explain them, that is the best way I can ask you.

A. They demonstrate there was a lack of re-conditioning. If I may start from the beginning, in drawing lumber the moisture must travel from the inside out and—

Q. Hold them up a little higher so the Court can see what you are talking about.

A. The surface of the board will be drier than the center, that is the only way it can dry is for the moisture to travel toward the drier areas. When lumber gets to around 25 per cent moisture content it begins to shrink; above 25 per cent there is no

(Testimony of Lyle Hickman.)

shrinkage. When the surface gets below 25 per cent before the center does, the center hasn't shrunk yet and the outside can't shrink because the center is still swelled up, so the outside takes on a stress, gets in a stressed [840] condition and at the same time it gets harder, it hardens and stiffens. And then later on in the process the center starts to shrink and it can't—this is already in a set condition and this pulls and pulls—this was set and this was dry and this dries out equal to this, it shrinks and can't because it is set in that condition.

Q. Did you saw these two pieces you have in your hand off a piece of lumber?

A. Yes. They were two feet back and I picked them out at random in the storage shed.

Q. Did you split it?

A. Sawed it back two feet from the end of the board, run the saw this way.

Q. That is each of those is a piece of a board in its entirety? A. Yes, back two feet.

Q. Those two were taken at random out of what you looked at and picked up out of the storage?

A. Storage shed, yes.

Q. Do I understand your opinion and conclusion is, after looking at those that sample indicates improper reconditioning in the kiln?

A. Yes, sir, lack of adequate conditioning.

Q. Let me hand you these other two also marked No. 2, did you take those off the same board? [841]

A. Yes.

(Testimony of Lyle Hickman.)

Q. Just tell us in your own way, Mr. Hickman, what those two pieces of wood indicate in the way of proper or improper conditioning?

A. They indicate the same thing, only this is a different system of sawing samples. We have three different methods. This is the standard method of Forest Products Laboratory in Madison recommends to saw case hardened samples. They also saw several slots like this. The other got broken up so bad I did not bring it. They are three ways of demonstrating the same thing, the same problem.

Q. You say the same problem, what does that demonstrate?

A. Lack of adequate reconditioning.

Q. And that is hardening and drawing on the outside before it gets properly dried on the inside and not moistening the outside so it will have a stress?

A. Yes, sir.

Q. The other piece of wood you have that you marked No. 1, what does that indicate?

A. That indicates the same problem, the tension there. If this had been cut out like this, a similar cut like this, except they didn't take out the core so that could go together. This particular board has a cut this way, that isn't related to the conditioning, but still has the tension.

Q. Let me ask you, Mr. Hickman, after inspecting the [842] kilns, after taking these samples, what is your opinion with respect to whether or not the kilns you inspected need repairing or re-

(Testimony of Lyle Hickman.)

conditioning or new equipment in them or abandoning them and build new ones in order to get a proper operation up there?

A. I couldn't recommend which way, whether new ones or rebuilding would be the best, because that is an economic thing. But they should be, would have to be different equipment installed to get a proper—without using too long a time, or a long time to condition.

Q. As I understand your statement, you don't want to make a recommendation here as to whether they abandon these and build new ones or put in new equipment and so forth in the ones they have, but you do recommend in your opinion one or the other is advisable insofar as that operation is concerned?

A. Yes, there should be some improvement made.

Q. That is your conclusion? A. Yes.

Mr. Moore: That is all.

Cross Examination

Q. (By Mr. Romley): Mr. Hickman, where is your office maintained, sir?

A. It is at 1377 Southeast 13th in Portland, Oregon. [843] That is our laboratory. The main office is in the Yeon Building.

Q. Your office is in the City of Portland?

A. It is in the City of Portland.

Q. When did you go to the Duke City mill at Winslow to make this inspection you have referred to in your testimony?

(Testimony of Lyle Hickman.)

A. I arrived at Winslow, that was Saturday afternoon.

Q. Of this past week?

A. This past week and I did that inspection, and then Sunday I interviewed the kiln operator. And then Monday I made as thorough an inspection as I could, shutting the kiln down, cooling it off and going in and inspecting it.

Q. Did you go through the entire Duke City plant at Winslow? A. Just as a tour.

Q. Did you observe all of the—was the mill operating when you were there on Monday?

A. It was in the afternoon.

Q. Did you observe the condition, general condition of the entire mill, including the kiln, planing mill, sawmill, et cetera?

A. I make observations of the mill when I go through, I am interested in seasoning and it is all tied in together.

Q. I am not sure I understood your answer.

A. I say I always go through the plant for an inspection. [844] It is more the way the lumber is produced.

Q. You did not inspect the kiln alone, you inspected the whole plant, more minutely the kiln, is that the situation?

A. I toured the rest of the plant and looked at the equipment.

Q. From your observation was all of the remaining equipment in the plant, laying aside for a mo-

(Testimony of Lyle Hickman.)

ment, sir, the kiln, will you tell us if in your opinion the remaining equipment and machinery in the plant was in good, satisfactory, average operating condition?

A. I am not—I couldn't—it is out of my field; but it seemed to be in adequate running order.

Q. Good adequate running order?

A. Surveying lumber, I couldn't say what condition the equipment was in.

Q. It was making lumber?

A. I couldn't say what kind of condition the equipment was in, that was out of my line.

Q. From all appearances it seemed to be in operating condition?

A. Operating condition, yes.

Q. With regard to these two kilns, do you know how long they had been in existence there?

A. Not exactly. Approximately seven or eight years I believe. [845]

Q. You know these two kilns had been conditioning lumber then for substantially that period of time? A. Yes.

Q. You say you are not in a position to recommend whether these kilns should be reconditioned or whether new ones should be installed, you feel that is a matter for management?

A. That takes management and an economic study.

Q. On the basis of your observation, is it your opinion, sir, that these two kilns could be recondi-

(Testimony of Lyle Hickman.)

tioned to the extent they will be efficient, satisfactory, economical in their operation?

A. How was that again?

(The last question was read.)

A. The word reconditioning is a word there, I would judge there would have to be some changes in some of the equipment to make them satisfactory.

Q. But with some changes they could be placed in a good satisfactory, efficient operating condition, is that right?

A. Yes, I could say that, good condition.

Q. In your opinion, sir, what would it cost to put these kilns in that condition, approximately? I appreciate you can't tell us exactly, but do you have an opinion on that?

A. From the appearance of the Reese kiln, the big kiln, it would take extensive—the building is in pretty bad condition. It would take an extensive remodeling job. [846] I couldn't say exactly.

Q. I am asking, sir, dollar-wise if you can say approximately what it would cost?

A. I could use a broad base, say between 15 and \$20,000.

Q. You think that would be a reasonably accurate estimate?

A. That would be reasonable, I believe. That would put them in condition like they were when they were new, not new, but reasonably.

Q. Is it your opinion, sir, that with the expenditure of some 15 or \$20,000 that these kilns then

(Testimony of Lyle Hickman.)

could operate satisfactorily in the future for some period of time?

A. Did I say 15 to 20, or 15 to 25?

A. I am not sure, sir. I think you said 15 to 20. What is your opinion as to the cost?

A. It would be 15 to 25.

Q. I don't mean to misstate you, I thought you said 15 to 20. A. Maybe I said it wrong.

Q. Is it your opinion that upon the expenditure of somewhere between 15 and \$25,000 this kiln could be put in condition where it would operate satisfactorily for some period of time in the future?

A. I wouldn't want to limit that to some time in the future. [847]

Q. If you tell me yes then I will ask you for how long in the future; if you tell me no, I can't go any further than that, sir. Perhaps I can state the question in this way, Mr. Hickman. In order to place it in the condition you have related so to be almost like new, as you said, the expenditure of this amount of money, can you tell us how long they could continue to operate satisfactorily and efficiently, assuming that any normal usual maintenance is given the kiln?

A. By experience I couldn't tell because this is a kiln we have had no history with, so it would have to be a guess and——

Mr. Moore: We object, if your Honor please, because the witness has stated there is no foundation or basis upon which he can form an intelligent

(Testimony of Lyle Hickman.)

opinion to answer the question, simply have to guess because he has not had adequate history of this type kiln.

The Court: Objection sustained. [848]

Q. It's true, is it not, Mr. Hickman, that all kilns require a certain amount of maintenance, even a new kiln?

A. Oh, yes, they should have preventive maintenance all the time.

Q. And generally that maintenance expense is charged off as part of the operating expense, or do you know?

A. I don't know how they do that, each different mills do it different ways.

Q. I see. But there are expenses occurring from year to year in maintaining every mill, even though it's one of the best, is that right, sir? I mean every kiln, even though it's one of the best, is that right, sir?

A. There is always some maintenance, I mean a piece of machinery.

Q. In what?

A. Any piece of machinery takes a certain amount of maintenance.

Q. Now, do you know how long a new kiln properly constructed and installed and maintained can continue to be used efficiently and economically in a mill?

Mr. Moore: We object to the question, if your Honor please, because it does not contain the elements necessary for the witness to give an opinion

(Testimony of Lyle Hickman.)

in that it does not say whether it is a wooden kiln, whether it is a steel building, whether it is brick, whether it's concrete, whether it's block, and I [849] think that those are necessary elements for the witness to base an opinion on.

The Court: Well, I would think a great deal of it would depend on the type of kiln and so on.

Q. (By Mr. Romley): How many different types of kilns are there, sir?

A. The majority of the kilns are made out of masonry, tile, brick or concrete, and with wooden roofs. Wood roofs. The majority of the kilns. Some are made out of wood, wooden walls, a considerable amount of them, wooden walls and a complete wooden structure.

Q. How much does a new kiln of that type that you have mentioned cost?

A. I'd have to go back to my round figures again and it would be about \$50,000 for the one like the Reese kiln.

Q. How long would a kiln such as you have described be expected, can be expected it would operate satisfactorily and efficiently, assuming it gets normal care and attention and maintenance that you have referred to earlier in your testimony?

A. Are we considering now the concrete or masonry wall and wooden roof?

Q. The one you just described, sir.

A. The wooden roof would—we recommend—we plan or figure that a wooden roof—the life of a

(Testimony of Lyle Hickman.)

wooden roof is seven [850] years. Most of them are replaced in about nine years, but we figure the useful life is seven years.

Q. But most are replaced in about nine?

A. Yes.

Q. That's roof only?

A. That's been our actual useful life is about seven years is what we figure. After that you are losing efficiency.

Q. How about the rest of the kiln?

A. The rest of it is—will last for years, I guess, twenty, twenty-five.

Q. How many years, sir?

A. Twenty, twenty-five years, with replacements and if they were still properly maintained and cared for.

Q. That's right, properly maintained?

A. Yes.

Q. Twenty to twenty-five years? A. Yes.

Q. Would it be your opinion, sir, that if the existing kilns were repaired and the new parts installed, new machinery installed that you have referred to, and if they are properly maintained during the years, that they could continue to be used satisfactorily and efficiently for, say, the next thirteen or fifteen years at least?

A. The present kilns that are there?

Q. Yes, sir. [851]

A. Efficiently did you say, efficiently?

(Testimony of Lyle Hickman.)

Q. Yes, satisfactorily.

A. There might be a possibility that the Reese kiln with very much maintenance would last, but the other kiln is more or less on the obsolete type of kiln.

Q. The Bloxham?

A. The Bloxham, and it would not be efficient.

Q. All right. Then do I understand you, sir, that the Reese kiln under those circumstances could last and be used and operate satisfactorily for, say, thirteen to fifteen years, but the Bloxham would be less than that?

A. It could, with an extreme amount of maintenance, that——

Q. Now, how long could the Bloxham kiln be used under those same circumstances and conditions?

A. That word “efficiently” in there is—that would be the thing that’s—I don’t understand, what efficient is to one person might not be to the other.

Q. Which of these is the larger of the two?

A. The Reese.

Q. The Reese. That is the one that—well, strike that.

Do you know what the production is at that Duke City mill now in Winslow? A. No, I don’t.

Q. If it’s twenty-nine to thirty million feet a year, would it be fair to say, sir, that when that production drops down, say in 1964, January of 1964 to approximately sixteen million feet and the next year to twelve million feet, and after 1968 to

(Testimony of Lyle Hickman.)

about ten and a half million feet, would it be reasonable to assume, sir, that at those times the amount required from the kilns will be less than it is at the present capacity of twenty-nine or thirty million?

A. I don't believe I can answer that, I don't believe I am qualified to.

Q. I beg your pardon?

A. I don't believe I am qualified to answer that kind of a question.

Q. Well, the more you produce the more kiln space you require, isn't that right, sir?

A. Yes, that would be right. I don't know the capacity, what the kilns are drying now, that's one thing I didn't get is how much the monthly production is through the kilns. I didn't get that information, that's the reason I couldn't answer.

Q. Well, in your opinion from your observation can the larger of these two, the Reese kiln take care of sixteen million feet a year?

A. I am not fast enough on mathematics to answer that, I couldn't—

Q. You don't feel qualified to answer that?

A. No, I'd have to get some pencil and paper to answer that one. [853]

Q. Now, is some lumber dried in a dry kiln and some air dried? A. At that plant?

Q. Yes. A. Yes.

Q. Do you know whether these samples that you have here were air dried or kiln dried, of your own personal knowlege?

(Testimony of Lyle Hickman.)

A. I couldn't exactly swear to it, but by all indications they dry—they dry this grade of lumber through their kilns, and it's very unlikely that it had ever been not kiln dried, it's from their dry shed and they don't—this grade, shop and better is not dried in the yard.

Q. Well, are you——

A. So it would be a——

Q. Are you saying this was dried in the kiln?

A. I would almost swear to it that it was dried in the kiln, because it's their practice to do that. I wouldn't——

Q. Who was with you when you selected these random samples? A. Mr. Lee Weaver.

Q. He is an employee there at Duke City?

A. Yes, I picked the samples.

Q. Just as you say, at random there?

A. At random, yes.

Q. And of course you have no means of knowing of your own knowledge how long this, these samples were in the kiln if [854] they were there at all, do you?

A. No, I couldn't say how long, but——

Q. Does the length of time that the lumber is in a kiln, is that important?

A. It is in a way, the faster the lumber is dried the more case hardening you get. If it's dried, for example if it's dried in the yard, air dried, there's very little case hardening and so little that you don't recognize it. And the more you accelerate the dry-

(Testimony of Lyle Hickman.)

ing of the lumber the more case hardening you get. But on the same—to that extent we in the dry kiln consultants, not only of the Western Pine but Forest Product Laboratory are recommending that lumber be dried as fast as you can dry it, case harden it because regardless of the amount of case hardening, and then relieve the case hardening, that's our recommendation.

Q. Do you find sometimes that even in good kilns or the best of kilns that the lumber dries better from one location in the same kiln as compared to another? A. Yes, that's quite—

Q. You don't know, of course, where this came from?

A. No, I don't know where this came from.

Q. Is this a fact too, sir: That when lumber such as these samples you have here are cut into narrow strips, that they are prone to warp more as these appear to be than a one by two or one by four or one by eight? [855]

A. I didn't get that one.

Q. Well, is it true, sir, that these narrower strips of lumber such as you have in these samples have a tendency to warp very easily as compared to a wider piece of lumber?

A. The amount of warp would be directly related to the width, the warp would be the same. It would show up more in a wider piece, although the curve would be the same, the radius of curve would be the same.

Mr. Romley: That's all, sir, thank you.

(Testimony of Lyle Hickman.)

Mr. Moore: Just one more question, Mr. Hickman, to be sure that I understand you.

Redirect Examination

Q. (By Mr. Moore): The estimated life that you gave on the walls of a kiln to Mr. Romley, you were referring to concrete or masonry constructed buildings with a wooden roof?

A. Yes, I didn't have in mind at all a metal building, I wasn't considering the metal building at all.

Q. You were not considering a metal building?

A. No.

Q. Nor a wooden building? A. No.

Q. You are not considering the type of kilns you saw at Duke City Lumber Company's yard in Winslow? [856] A. No.

Mr. Moore: That's all, thank you.

Recross Examination

Q. (By Mr. Romley): You were considering one of the best, newest and most modern type that would be installed new, is that right?

A. Well, not necessarily the best but the average.

Q. The average?

A. The average type that's built now.

Q. One that in your opinion you would say would cost new approxiamtely \$50,000, is that right?

A. Yes, the one that we would think would be the most economical kiln to build.

(Testimony of Lyle Hickman.)

Q. And the one that you say would take, would have to have the roof replaced, you think, in seven years, but it quite often is used for nine years?

A. Yes.

Q. What part of the total cost is reflected in the replacement of the roof? A. (No answer.)

Q. For how much could you replace the roof every seven years or every nine years?

A. That I don't know, that would have to be figured out from the number of board feet of lumber, I have no figures on [857] that, I have never asked anybody how much it did cost.

Q. Is that dependent on the number of squares?

A. Number of square feet of roofing, yes, amount of lumber and amount of labor.

Q. Well, do you have the opinion as to the number of squares that would be involved in a roof of this type of structure, a new one of the type you have mentioned?

Mr. Moore: What size?

Mr. Romley: Well, the same size as the existing Reese.

A. Yes, that's the same size, that would be about 64 feet long and about 40 feet wide with a gabled roof. That would be—I don't know just how many squares that would be.

Q. Sixty by forty, did you say? A. Yes.

Q. Is that 2400 square feet?

A. It would be——

(Testimony of Lyle Hickman.)

Q. I think that's 2400 square feet. How much does that cost per square, per square foot cost of replacing that roof?

Mr. Moore: He said gabled roof.

Q. (By Mr. Romley): Gabled then, it would be something more?

A. It would be something more than that.

Q. It wouldn't be more than one and a half times the total, would it?

A. No, it would be about half again the [858] total.

Q. Half again, one and a half? A. Yes.

Q. About one a quarter times, approximately?

A. It would be a half—they are half pitch roof, that would—it would be about a one and a half of what you figured for the flat roof.

Q. So it would be about 3600 square feet instead of 2400, is that right?

A. If those figures are right, yes.

Q. And how much does that cost to replace 3600 square feet every seven or nine years?

A. I wouldn't know, I wouldn't know the price of the lumber that they used or the cost of the labor that was used to put on——

Q. Did you have any idea as to the cost of the lumber?

A. No, I wouldn't. I wouldn't know what the company would charge themselves for the lumber, it would be their own lumber.

Q. They'd manufacture it themselves?

A. Yes, they'd manufacture it themselves.

(Testimony of Lyle Hickman.)

Q. They could do it cheaper than if they went out on the open market and bought it at either wholesale or retail, isn't that right? A. I—

Mr. Moore: Your Honor, I object to this [859] line of questioning. We are getting into speculative matters, whether they can get it cheaper from themselves or somewhere else, it appears to me to be somewhat irrelevant.

The Court: I thought he answered.

Q. (By Mr. Romley): I didn't hear your answer, sir.

A. Oh, I didn't answer.

The Court: I thought he answered.

Mr. Romley: I didn't hear it.

Q. (By Romley): What is your answer, sir? Can they make it cheaper than they would buy it wholesale or retail?

A. I should think so.

Q. All right. Now, what can it be bought for retail, do you know?

A. No, I don't.

Q. What can it be bought for wholesale, do you have any idea?

A. No, I wouldn't know either. We don't know when we are going to put this roof on, we wouldn't know what the price would be at that time.

Q. Well, do you know what it is today?

A. Well, it would be between seventy-five and a hundred dollars a thousand, I'd presume.

Q. And can you translate that 75 to \$100 a thousand to 3600 square feet? I can't do that.

(Testimony of Lyle Hickman.)

A. I can't either. [860]

Q. You could do it if you had time, you mean?

A. Well, I guess I could multiply, it could be done, yes.

Q. Will you do that, please, sir? I want to get an idea of the cost of this roof.

Mr. Moore: Mr. Romley, you have a lot of lumber people, I think that could figure that pretty quick. Your representative is qualified to do that.

A. You are getting out of my area.

Q. (By Mr. Romley): Did you express an opinion to me this morning as to what it would cost to replace that roof by lumber?

A. No, not the roof.

Mr. Romley: That's all.

Mr. Moore: That's all, Mr. Hickman. Thank you, sir. May this witness be excused, you Honor?

Mr. Romley: I have no objection.

The Court: You may be excused, Mr. Hickman.

Mr. Moore: Mr. Andy Steward, please.

ANDY STEWARD

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): Will you state your name, please, sir? [861]

A. Andy Steward.

Q. Where do you live, Mr. Steward?

A. Albuquerque, New Mexico.

Q. What is your occupation?

(Testimony of Andy Steward.)

A. Supervisor in the planing mill, planing mill foreman, planing mill assistant.

Q. Supervisor of—I didn't understand you.

A. Supervisor in the planing mill and kind of master mechanic in the planing mill, over the machinery.

Q. And you are employed by whom?

A. Duke City Lumber Company.

Q. How long have you been in the employ of Duke City Lumber Company?

A. Almost fifteen years.

Q. How long have you been engaged in work in the operation of a planing mill or as a mechanic with reference to planing mills and trimmers and—

A. Twenty-three years, a little over.

Q. Mr. Stewart, did you go over to Winslow in the early part of 1959 to look at or do some work on the mill that Duke City had bought from Arizona Timber Company? A. Yes, sir I did.

Q. Where you over there before February of '59 to look at it or to do any work on it?

A. Just—I was just over there. [862]

Q. When?

A. Just one day, I think, in one day and out.

Q. When was that?

A. Well, that would be approximately a week or so before I went over there.

Q. I see. And when you went over the first time for the one day what was the purpose of your trip?

A. Just to see, just to look at it.

(Testimony of Andy Steward.)

Q. Look over the planing mill. A. Yes.

Q. Did you go over—did you look at or inspect the saw mill? A. No.

Q. Do I understand correctly, your work is limited to planing mills? A. Yes, sir.

Q. What was the condition, generally, of the planing mill that you saw at Winslow when you went over on your first trip?

A. It was pretty badly shot at first.

Q. Then when you went back what did you do with respect to correcting this shot condition you are talking about?

A. Well, we worked around there trying to get it to keep it together until we could get the parts to fix it up.

Q. And did you have to get new parts?

A. Had to get new parts. [863]

Q. To put it in condition? A. Yes.

Q. How long did you work on it, do you recall?

A. Well, I was over there two weeks that month. I went back and stayed three weeks. Then about two weeks out of each month I was over there for about three months there, and then I went back in November and overhauled the machine. We put new parts in it.

Q. Was there any replacement of a planing mill, one come over from Albuquerque to replace one?

A. Yes, we had taken one out, I sent one from Albuquerque over there.

(Testimony of Andy Steward.)

Q. Why did you take the one out at Winslow?

A. Well, it was wore out and too much down, lost time on it. It wasn't—couldn't do any good with it.

Q. What is the function of a planing mill, what does it do with respect to the manufacture of lumber?

A. Well, you—it comes in rough and you remanufacture it, surface it through the planing mill and run it out through the trimmer ready for use, shipping.

Q. Well, I think we are all familiar with tongue and groove lumber. Is that a part of the operation of the planing mill?

A. That's a part of the operation of a planing mill.

Q. That is to cut the lumber into what we call tongue and groove? [865]

A. Yes, tongue and groove.

Q. How many planers were there in the plant at Winslow when you first went over and looked at it, was there just one? A. Two.

Q. And one of those you took out and sent one over from Albuquerque, is that correct?

A. Yes, that's correct.

Q. Now, then, what did you do to the other one?

A. Well, we finally got enough parts we could overhaul it, all we could do was just patch it up, try to make it turn until we finally got the parts to fix it up where it would run.

(Testimony of Andy Steward.)

Q. Now, what about—is there a trimmer or was there a trimmer in the plant at Winslow when you went over? A. Yes, there was.

Q. Did you do any work on the trimmer?

A. Well, we done some work on it, didn't do much good with it.

Q. Did you replace it? A. We replaced it.

Q. Replace the trimmer entirely with a new unit? A. Entirely.

Q. Also did you have anything to do with the installation of a printer and waxer?

A. Yes, sir.

Q. What is a printer and waxer? [865]

A. Well, it's a—it sets behind your trimmer, and it's got a—you print the end of your broad "Duke City Lumber Company," and the waxer waxes the end of it after it's printed.

Q. Was there a printer and waxer among the equipment you found when you first went over to this mill? A. No, sir.

Q. Now, when was it, do you recall, Mr. Steward, when you went over and overhauled the planer?

A. It was during Thanksgiving week.

Q. That was in November?

A. November.

Q. Of '59? A. '59.

Q. And that's when you did what we would call the substantial overhaul job?

A. Yes, what parts we could get. There was some of them came in after I left.

(Testimony of Andy Steward.)

Q. Mr. Steward, we have had some discussion here about stacking sticks. What are stacking sticks?

A. Well, they are just a strip about three-quarters, thirteen-sixteenths thick and about two inches wide, fifty-four inches long. It's only what size you use. We use fifty-four inch loads.

Q. Excuse me, I didn't mean to interrupt you. What are they used for? [866]

A. Well, between the boards to keep the air circulating through them and keep them from cupping.

Q. In other words, when lumber is stacked you mean?

A. Stacked on these layers, between each layer of wood.

Q. I see. Do those stacking sticks break or wear out? A. Well, they break.

Q. What is the percentage of breakage, do you know?

A. Well, I wouldn't know just from day to day. But you can stand and watch them like I do day in and day out for a year, I'd say we replace about 50 percent a year, year in and year out. Some years it might take more, I figure about, just standing there seeing them every day and what we lay out that's broken, if they break a couple inches off the end they are not any good to us any more.

Q. Were you over in Winslow in February, 1957? A. Yes, sir.

(Testimony of Andy Steward.)

Q. Were you sent over there by Mr. Liberman or Mr. Grevey? A. Yes, sir.

Q. What was the purpose of that trip?

A. We went over there to look at a site to put a planing mill and saw mill later on.

Q. And did you lay out plans and so forth for it?

A. Yes, sir, we did, for the planing mill.

Q. Do you remember where that site was?

A. Yes, sir. [867]

Mr. Romley: Just a moment, if your Honor please, I object to this line of testimony. I don't think it's material. It has no probative value.

Mr. Moore: It lays a foundation for some short evidence we will have later, your Honor, to explain some of the evidence that's now before the Court. That's all I have on it anyway, I am through with it.

The Court: Very well.

Mr. Moore: That's all, Mr. Steward.

Cross Examination

Q. (By Mr. Romley): Mr. Steward, you say there were two planers when you went there in February of '59? A. Yes, sir, there was.

Q. And you took one out and took it to Albuquerque and brought one in from Albuquerque?

A. No, we didn't take it to Albuquerque, we brought one from Albuquerque over here and took that one out.

(Testimony of Andy Steward.)

Q. Well, one of the original two you just repaired and it remained and is still there, is that right, sir? A. Yes, sir, one of them.

Q. And the other one of the two was replaced by one that you sent over from Albuquerque?

A. Yes, sir. [868]

Q. What did you do with the one that was there that was replaced by the Albuquerque one?

A. As far as I know it's still over there.

Q. So there are three now?

A. I don't know, it's setting down there as far as I know, I don't know.

Q. Did you do any overhauling at all in February?

A. Well, just—you know, just repair work we could do with what we had to do with, that's all.

Q. This matter of overhauling planers is something that comes up every few years or maybe oftener than that in every saw mill, isn't that right?

A. Well, yes, that's right.

Q. How often do you overhaul a planer?

A. Oh, just a matter like about every two, three years.

Q. Every two or three years you do it, even with those in the best of condition? A. Yes, sir.

Mr. Romley: That's all.

Mr. Moore: That's all, Mr. Steward. [869]

YALE WEINSTEIN

called as a witness herein, having been previously duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): Mr. Weinstein, you were in the courtroom this morning, were you not, when Mr. Hickman testified? A. Yes, sir.

Q. Were you familiar with the kilns that were in existence at the Winslow mill when Duke City took it over from Arizona Timber Company?

A. Yes, sir.

Q. Was there any conditioning equipment in those kilns at that time?

A. None whatsoever.

Q. Has Duke City since installed the conditioning equipment in the kilns; by conditioning equipment, I mean the equipment to condition the lumber that Mr. Hickman was talking about?

A. We have, sir.

Q. And the equipment you have installed has been in use for how long, approximately?

A. I would say approximately six or eight months.

Q. Do you know whether or not, even after the installation [870] of that equipment in these kilns, there have still been complaints from customers of remanufactured lumber with respect to the quality or condition of it?

A. I am aware of those complaints, yes, sir.

(Testimony of Yale Weinstein.)

Q. I asked you yesterday, Mr. Weinstein, about some invoices, I mean the bids.

Mr. Weinstein, I hand you what is marked Defendants' Exhibit I for identification; tell the Court, please, what that is, without giving the information therein contained.

(Defendants' Exhibit I marked for identification.)

A. Mr. Moore, this is a proposal or a bid in answer to a request we made to the Moore Dry Kiln Company for a dry kiln for our plant in Winslow.

Q. Does that provide for a kiln of concrete or block or brick construction?

Mr. Romley: I think I can save some time. We have no objection to it.

Mr. Moore: Very well. We offer Defendants' Exhibit I in evidence.

The Court: It may be received.

(Defendants' Exhibit I marked in evidence.)

Q. (By Mr. Moore): Mr. Weinstein, I note on that exhibit just introduced that it is the bid on a direct gas heat kiln?

A. Yes, sir, it is a bid on a direct fired gas kiln.

Q. From your experience is that as efficient an operation [871] as a steam heated dry kiln?

A. No, sir.

Q. Does that proposal that we introduced in evidence include the cost of construction?

A. No, sir. This is for the kiln.

Mr. Romley: You mean cost of erection?

Mr. Moore: Erection or construction.

(Testimony of Yale Weinstein.)

Mr. Romley: It is a pre-fab deal, isn't it? Excuse me, your Honor, I didn't mean to exchange remarks with counsel.

A. It does not include the cost of erection. While I haven't read this recently, I think we had a requirement to furnish roofing material in addition to the pre-fabbed metal.

Q. I believe the total amount shown there, so I have it in my mind to make a note, is something over \$40,000?

A. That is correct, Mr. Moore.

Q. You were here also, Mr. Weinstein, when Mr. Steward was testifying, were you not?

A. Yes, sir.

Q. He was talking about the repairs to a planer?

A. Yes, sir.

Q. I asked you to get certain invoices and to make a list of expenses calculated from those invoices which I am going to ask you about, but preliminarily is this the list of the repairs on the planer which Mr. Steward was talking [872] about?

A. Yes, sir.

Q. I think I can save a moment, your Honor.

Mr. Weinstein, let me hand you, before I mark it as an exhibit, then we can mark it for identification, a yellow sheet of paper with certain figures on it and ask you this. Does that contain a correct list of the invoices that were paid for repairs to the planer mentioned at the top of the sheet?

A. Yes, sir.

(Testimony of Yale Weinstein.)

Q. And are those figures copied from the invoices which I have here?

A. They are. You don't have all the invoices, Mr. Moore. Some of them are contained in the other folder.

Q. We have all the invoices in the courtroom from which those figures were taken?

A. Yes, sir. I have personally prepared this list, sir.

Mr. Moore: Let me have that sheet so we may have it marked.

(Defendants' Exhibit J marked for identification.)

Q. (By Mr. Moore): Mr. Weinstein, I have three folders in my hand, one marked Irvington Machine Works, 1960-61; another Irvington Machine Works and S. A. Wood Machine Company. These folders contain invoices?

A. Yes, sir. May I explain it just a moment?

Q. What I want to do is be certain we have the correct list there from invoices that are in these folders.

A. They are correct, sir. However, during 1959 the S. A. Wood's representation was changed from a factory branch to the Irvington Manufacturing Company. That is the reason a portion of these invoices were received from Irvington for the same piece of machinery and some of them directly from the manufacturer, S. A. Woods. And the only ones

(Testimony of Yale Weinstein.)

contained here, Mr. Moore, are the ones we were positively able to identify as parts that went on this one specific machine.

Q. On these invoices you have here, are there invoices on other items not shown on that sheet?

A. Yes, sir.

Q. All of the items shown on that sheet, Defendants' Exhibit J for identification, are taken from an invoice within these folders?

A. That is right, Mr. Moore.

Mr. Moore: From that identification, your Honor, and not to encumber the record too much, rather than offer all of these invoices, we offer Defendants' Exhibit J and I have the invoices here and give counsel an opportunity to examine them and compare them with this exhibit now or during the noon hour at his convenience?

Mr. Romley: I have no objection, your [874] Honor.

The Court: It may be received.

(Defendants' Exhibit J marked in evidence.)

Q. (By Mr. Moore): Mr. Weinstein in addition to the items of repairs shown on Defendants' Exhibit J and in addition to—well, further explaining Mr. Steward's testimony, what other pieces of equipment were either replaced or repaired or new ones brought into that mill after Duke City took it over? I am not talking about rolling stock, I want to segregate the two.

(Testimony of Yale Weinstein.)

A. Items that were not acquired by Duke City Lumber Company from Arizona Timber Company, Mr. Moore, included an automatic——

Mr. Romley: You say these are items not required?

Mr. Moore: Items——

Mr. Romley: Not included?

Mr. Moore: I will tie it up.

Mr. Romley: Go ahead.

A. (Continuing): Consisted of an automatic lumber stacker, the machine which was previously been referred to as replacing our Newman planer in the planing mill; we installed the Irvington trimmer in the planing mill. There is an item of a lumber storage shed, a surface lumber storage shed.

Q. Are you acquainted with the costs and values of those pieces of equipment generally?

A. I am, sir. [875]

Q. What is your estimate as to the value of the Irvington trimmer?

A. Approximately \$10,000, sir.

Q. The stacker that you say was put in, does that have a name?

A. That is a Lawson stacker and that has a value of \$35,000.

Q. What about the planer that was brought over and substituted for one, do you have an opinion as to the value of that?

A. The installation as it is represented represents a value of \$25,000.

(Testimony of Yale Weinstein.)

Q. Do you have an opinion as to the value of the storage shed you mentioned?

A. About \$7500.

Q. Those, as I understand you, Mr. Weinstein, are substitutions and additions of equipment independent of the dry kiln, separate from the dry kiln?

Mr. Romley: I object to the form of the question. I don't think he said they were substitutions—I beg your pardon, the one planer.

Mr. Moore: Substitutions or additions.

Mr. Romley: I am mistaken.

A. They are, sir.

Q. (By Mr. Moore): And can you testify [876] whether or not you are getting a satisfactory operation out of your dry kilns that are now there?

A. We are not, sir.

Q. In view of your experience and the type of product desired to be manufactured, do you have an opinion as to whether it will be necessary to replace the dry kilns with new ones?

A. I have my own personal opinion that these must be replaced and we contemplate such a replacement. It is merely a matter of determining the exact type and when.

Q. Do you have an opinion as to the ultimate cost of such equipment?

A. My opinion is that our minimum cost will be in excess of \$50,000, Mr. Moore.

Q. Now, with reference to the rolling stock. Have you at our request made a list of the rolling stock which ultimately will have to be replaced and put

(Testimony of Yale Weinstein.)

on this list after checking into the matter, your estimate of the cost of such replacements?

A. I have, sir.

The Court: We will take the morning recess at this time. [877]

(Recess)

After Recess:

Q. (By Mr. Moore): Mr. Weinstein, I was asking you about the list that you had prepared with respect to the replacement of rolling stock. In that list did you also include some replacements that have already been made? A. I have, sir.

Q. What replacements have already been made?

A. We have already replaced a lumber carrier and a lumber fork lift.

Q. And the list that you prepared, does that include your opinions as to the items and the cost of each? A. Yes, sir.

Q. And does that include the items that have already been replaced which you just mentioned?

A. Yes, sir.

(Defendants' Exhibit K marked for identification.)

Q. (By Mr. Moore): Mr. Weinstein, I hand you Defendants' Exhibit K for identification and ask you if that is the list which we were just talking about? A. Yes, sir.

Q. And you have prepared that in accordance with what I have heretofore asked you and you have told me? A. Yes, sir.

(Testimony of Yale Weinstein.)

Mr. Romley: We have no objection to K, your Honor.

The Court: It may be received. [878]

(Defendants' Exhibit K received in evidence.)

Q. (By Mr. Moore): Simply for the record, and so that I may make a note over there and not have the exhibit, the total shown here is \$366,500 in one figure, and 406,000 in another.

Tell me now what the second column, what is that title?

A. It is entitled "With Wagner, Letourneau or Pettibone."

Q. What do those words mean?

A. They refer to a particular type of log stacker, and I have made an alternate column there, Mr. Moore, by reason of the fact that I am of the opinion that we must replace one piece of equipment that we currently have, that which we acquired from Arizona Timber Company with a new type of specialized equipment. Heretofore we have been able to handle our logs on the landing with a track-type hydraulic log stacker. In view of the fact that our readily accessible timber is no longer available to us——

Q. Readily accessible at what time of the year do you mean?

A. During times of inclement and bad weather, we feel that we must start building up our log inventories as soon as we can get back into the woods, which will necessitate a specialized piece of equip-

(Testimony of Yale Weinstein.)

ment on the landing enabling us to unload entire truck loads and build up our inventories during this period of hazardous blueing season.

The same piece of equipment we contemplate will be needed to keep our inventory in a shape and a manner whereby [879] the older logs can be removed from the landing, put in the log pond for immediate manufacture through the saw mill and at the same time be used to accumulate our inventory. It's a piece of machinery that I feel will be needed to offset the disadvantage of not having our nest egg logging available to us during the periods of bad weather.

Q. And the cost of that particular machine is the one that you have shown in the alternate column you are talking about? A. Yes, sir.

Q. And that makes the total then, including that one, \$406,000? A. Yes, sir.

Q. Mr. Weinstein, were you familiar with the Nagel mill in 1952?

A. Only on the basis of observations that I have made in the course of visits to the Nagel plant.

Q. Are you familiar with the size of the mill with reference to capacity now from what it was in 1952? A. Yes, sir.

Q. How does it compare now with what it was in 1952?

A. Well, the present Nagel Lumber & Timber Company mill has had additions made to it in the form of a line bar resaw which was added, I be-

(Testimony of Yale Weinstein.)

lieve, during the period of perhaps 1958 which has increased the capacity of the present Nagel plant.

Q. Now, on September 23rd, 1958, Mr. Weinstein, do you recall whether or not you saw Mr. Jenkins and Mr. Nelson when they came over to Mr. Gallagher's office in Albuquerque?

A. I recall having seen them in the office, yes, sir.

Q. Later that day did you have an occasion or were you directed to go to an airport and check the log of certain companies with respect to flights on Saturday, September 20th?

Mr. Romley: Just a moment, if your Honor please I object to the form of the question because he was asked first if he recalled seeing them on September 23rd, 1958. His answer is not in the affirmative, he says, "I recall having seen them in the office." I don't know whether he saw them in the office that day, he hasn't said, or just recalls seeing them there from time to time.

Mr. Moore: Well, let me clarify that then if there is any doubt about it.

Mr. Romley: And further it's immaterial, if your Honor pleases.

The Court: He may answer. Go ahead, Mr. Moore.

Q. (By Mr. Moore): Did you see them in the office on September 23rd, 1958? A. Yes, sir.

Q. After they had gone were you directed by anyone to go to the airport to check logs in flights on Saturday, September 20th? [881]

(Testimony of Yale Weinstein.)

Mr. Romley: Object to that as entirely immaterial and hearsay.

Mr. Moore: I will tie up who it was and what he did.

The Court: He may answer. A. Yes, sir.

Q. (By Mr. Moore): Who directed you to do that? A. Mr. T. P. Gallagher.

Q. And what did he direct you to do with respect to checking logs of flights of the company on September 20th?

Mr. Romley: We renew the objection, your Honor.

The Court: He may tell what he did.

Q. (By Mr. Moore): What did you do in response to those directions?

A. I accompanied Mr. Paul Weber, who was the pilot for the Gallagher Company, to the Cutter-Carr, West Mesa Airport, and he checked the records to determine whether or not the flight had been made. [882]

Q. Flight made when? A. September 20th.

Q. To where?

A. To Winslow, from Albuquerque to Winslow.

Q. Did you also check the records or look at them with Mr. Weber?

A. I did not personally check the records with Mr. Weber, Mr. Moore.

Q. You saw him making that check?

A. Yes, sir.

Q. On October 8th, 9th and 10th, 1958, Mr. Weinstein, first you were in the courtroom yesterday afternoon, were you not? A. Yes, sir.

(Testimony of Yale Weinstein.)

Q. You heard the testimony with respect to conferences that Mr. Liberman had with Mr. Gallagher and with you, Mr. Cavanaugh, Mr. Wickens, with respect to negotiations concerning some matters respecting the sale of the Gallagher properties both in New Mexico and Arizona? A. Yes, sir.

Q. And later the negotiations with respect to the Arizona mill? A. Yes.

Q. What part of those negotiations were you present at?

A. On October 8th I accompanied Mr. Robert Gallagher and [883] Mr. Thomas Gallagher to the office of Mr. Liberman, Duke City Lumber Company. The following day, on October 9th, I was part of the group that met Mr. Gallagher at his apartment and later part of the group that went to the office of the Duke City Lumber Company to discuss matters with Mr. Liberman.

Q. All right. On October 8th, when you were in attendance at that conference, summarize for us what happened and what negotiations were held.

A. I accompanied Mr. Robert Gallagher and Mr. Thomas Gallagher to the office of Mr. Liberman, Duke City Lumber Company, at which time Tom substantially advised Mr. Liberman that——

Mr. Romley: Just a moment. Substantially advised——

Mr. Moore: The substance of what Mr. Gallagher said.

(Testimony of Yale Weinstein.)

A. Mr. Gallagher said he had made financial arrangements for the acquisition of the Kaplan properties for our group and the purpose of my visit, along with some other things that were discussed was to be determined from Mr. Liberman, whether or not he would be willing to continue the milling contract that——

Q. When you said Mr. Gallagher said something about “our group,” who was the group?

A. The group consisted of his brother Robert Gallagher, Mr. Tom Cavanaugh and myself and Mr. C. K. Wickens.

Q. In substance what did Mr. Liberman say with respect [884] to continuing the milling contract?

A. Mr. Liberman would not agree to continuing the milling contract and made reference to the fact that he had contemplated making the trip to New York to clear up matters pertaining to his name and character, whereupon Mr. Tom Gallagher got quite excited and made certain statements to Mr. Liberman and Mr. Liberman at that point suggested that this wasn't completely proper and his brother Bob more or less grabbed Tom by the arm and started to lead him out of the office.

Q. What did Mr. Gallagher say with reference to the continuance of the milling contract?

A. I am sorry, I didn't understand.

Q. What did Mr. Gallagher say with reference to continuing or continuance of the milling contract?

(Testimony of Yale Weinstein.)

A. Mr. Gallagher requested that when his group makes the acquisition he would like to have the milling contract continued.

Q. And by his group you are referring to the same people you named just a moment ago?

A. Yes, sir.

Q. That was at the end of the conference you were on on October 8th?

A. Yes, sir.

Q. The next time you were in on any of the negotiations [885] was when?

A. The following day, we were called to Mr. Gallagher's apartment.

Q. Who was there?

A. The same persons, Mr. Gallagher, Robert Gallagher, Tom Cavanaugh, Charley Wickens and myself.

Q. What was the substance of the negotiations at that meeting?

A. He told us that he had been in conference with Mr. Liberman all morning and had discussed the possibility of merger, joint venture, many possibilities. There were many possibilities that he put forth to us. However, he advised us that he had not made a definite commitment, he had discussed certain matters and wanted the opinion of the group as to their opinion on the matter.

Q. What was the next meeting you were in?

A. We left Mr. Gallagher's apartment and then went to the office of Mr. Liberman at Duke City Lumber Company.

(Testimony of Yale Weinstein.)

Q. What was the substance of your discussion there with Mr. Liberman?

Mr. Romley: I object to that as hearsay.

Mr. Moore: With Mr. Liberman?

Mr. Romley: Oh—yes.

Mr. Moore: Still in the same matter we were into yesterday that Mr. Romley opened up, by his questions and [886] the introduction of the deposition.

The Court: If it is in the deposition.

Mr. Romley: If it is there——

The Court: I don't know, I haven't read it in toto. Was Mr. Tom Gallagher at this meeting?

Mr. Moore: Just answer the Court's question, Mr. Weinstein.

The Witness: Mr. Tom Gallagher was not present at this meeting. His brother Robert Gallagher was present at this meeting with Mr. Liberman.

Q. (By Mr. Moore): In Mr. Liberman's office?

A. In Mr. Liberman's office, yes, sir.

Q. Were the discussions and negotiations there with respect to the same subject matter that had been covered in the conference you told us about the day before when Mr. Bob Gallagher and Tom Gallagher were both present and Mr. Liberman present? A. Yes, sir.

Q. Give us the substance of the conference in Mr. Liberman's office.

A. We made the same request; Mr. Liberman, he represented the group that contemplated the purchase of the Kaplan properties and we made a sim-

(Testimony of Yale Weinstein.)

ilar request of Mr. Liberman that any manner in which the merger, partnership or whatever might develop would be worked out, whether or not the milling [887] contract would be continued. Mr. Liberman advised us that as far as he was concerned he would not be in a position to give us an answer. He considered he had a prior deal and commitment from, on the purchase—gave us no answer in the affirmative he would be willing to carry out such a continuation of the agreement.

Q. You were not present in New York at any of the negotiations, were you, Mr. Weinstein?

A. No, sir.

Q. You have heretofore told us I believe that you went to work for Duke City on December 15th, at the time of the turn over of the plant or turn over of something, what was it?

A. I don't exactly recall which portion was turned over, but December 15th was agreed mutually between the two companies was a convenient date for my transfer of employment from Arizona Lumber Company to Duke City Lumber Company, it was December 15th.

Mr. Moore: That is all. Just a minute, excuse me, Mr. Romley. I did overlook a matter, if the Court please. Mr. Pfister called to my attention.

Q. (By Mr. Moore): Mr. Weinstein, tell us whether or not in your opinion it would be economically feasible to operate the present plant at Winslow at Duke City Lumber Company when the available production of timber drops to [888] 12

(Testimony of Yale Weinstein.)

or 10 million feet per year, assuming it will do that?

A. I do not believe it is economically feasible, Mr. Moore.

Q. What in your opinion would have to be done in order to make it an economically feasible operation?

A. In my opinion there would have to be very substantial changes made, particularly in our sawmill. We have a sawmill that was added on to and for the purpose of increasing the production we made certain additions and we now have a mill geared to production of about 30 million feet. In my opinion, in order to stay in an economic competitive position with the reduction of allowable cut to 12 million feet, I believe we would almost have to make a complete change, that is, to construct a new sawmill. That would be a few years hence. I don't know just exactly what conditions would govern our decision that might be made then, but on the basis of my experience of operating this plant, on a reduced cut of 12 million feet I don't believe it could be done economically.

Q. Would the same be true if the available cut were reduced to 16 million feet?

A. The same would be true, yes, sir.

Mr. Moore: That is all.

Cross Examination

Q. (By Mr. Romley): Has there been some discussion in the Duke City group with regard to what it will do when your production is down to 12 million?

(Testimony of Yale Weinstein.)

A. We have had no such discussion, sir.

Q. When it is down to 10 and a half million?

A. No, sir.

Q. Or 16 million? A. No, sir.

Q. No discussion at all? A. No, sir.

Q. But any discussion among any of the Duke City people or officials, Liberman or you, as a result of which you concluded it would not be economically feasible to operate when you dropped to that low a production?

A. I don't quite understand your question.

Mr. Romley: Would you read it, please?

(The last question was read.)

A. I have discussed this matter with Mr. Moore.

Q. (By Mr. Romley): Did you discuss it with Mr. Liberman?

A. No, I have no recollection of discussing this with Mr. Liberman.

Q. Did you hear Mr. Liberman say substantially the same thing yesterday?

A. Yes, sir.

Q. Before then you didn't know Mr. Liberman had an opinion [890] on that subject?

A. I don't know what Mr. Liberman's opinion was on that subject.

Q. When you discussed it with Mr. Moore, was Mr. Liberman present?

A. Not to my recollection.

Q. Has any thought been given by you as to how long timber will be available for production at the Duke City Mill in Winslow?

(Testimony of Yale Weinstein.)

A. Yes, sir.

Q. How far do you project it forward?

Mr. Moore: On what basis, Mr. Romley? We object to the question. if your Honor please, unless he includes the amount of available timber.

The Court: May I have the last two questions, Mr. Baker.

(The last two questions were read.)

The Court: He may answer.

A. Mr. Romley, in my own personal opinion one of the greatest problems we have to face in making projections and decisions is the inability to project beyond the timber that we apparently have under contract. We are aware of the provisions of the management plan and the Forest Service projections, but we always have hanging over our head the very real possibility of being unable to get the timber at a [891] price where we could continue at a profit or whether we could get the timber at all, as the result of competitive bidding.

Q. (By Mr. Romley): I thought you told us you had given some thought to projecting it forward, to what year are you talking about?

A. To no specific year.

Q. You say you take into consideration in your thinking only the existing contracts?

A. This is the only timber that we can look—

Q. No, please answer my question. You have taken into consideration only the existing contracts?

A. Specifically, yes, sir.

(Testimony of Yale Weinstein.)

Q. Well, do you not specifically take into consideration other contracts? That is not a good question. I couldn't answer it myself. I will withdraw that.

When you say specifically, you take into consideration only the existing contracts, do you mean that in some other manner you take into consideration other contracts, or don't you mean that?

A. Mr. Moore, I don't really quite understand your question—

Mr. Moore: Mr. Romley.

A. (Continuing): Excuse me, Mr. Romley.

Q. (By Mr. Romley): There is a timber sale coming up [892] this month, isn't there?

A. Yes, sir.

Q. That is in the Sitgreaves National Forest?

A. Yes, sir.

Q. In the Chevalon working circle?

A. It is.

Q. It provides for about 26,800,000 feet net log scale?

A. That is the estimate they have made.

Q. Those estimates are sometimes exceeded, are they not?

A. They are sometimes exceeded.

Q. More generally they are exceeded, more often they are exceeded than not?

A. I couldn't answer that question.

(Testimony of Yale Weinstein.)

Q. I beg your pardon?

A. We have had sales that were exceeded. We had one recently where the estimate was in excess of what we actually took.

Q. Is that the only one you remember where the estimate was in excess of what you actually cut?
A. Yes, sir.

Q. All the others were either right on the button, as they say, or in excess, is that right?

A. Substantially, sir.

Q. How many others were there, half a dozen or more?
A. No, sir. [893]

Q. I am not sure whether I asked you if it isn't a fact this sale is tailored for Duke City that is coming up this month?

A. We had requested this timber sale be put up.

Q. You intend to bid on it?
A. Yes, sir.

Q. Duke City does?
A. Yes, sir.

Q. You heard Mr. Jenkins say that Nagel does not intend to bid on that sale?
A. Yes, sir.

Q. You have no reason to anticipate that Duke City will not get the timber, do you?

A. I hope Duke City is the successful bidder on that sale, Mr. Romley.

Q. You have no reason to believe otherwise, do you?

A. I have no way of knowing, Mr. Romley.

Q. Do you have any reason to believe otherwise?

A. I do, sir.

(Testimony of Yale Weinstein.)

Q. In the many years you were with Arizona Timber Company at the Winslow plant, was there ever a sale noticed by the Forest Service that was tailored for Arizona Timber Company that it failed to get the timber on?

A. Mr. Romley, there are no timber sales that are tailored for any specific company. There were only three timber sales [894] in which the Arizona or its predecessor companies operated on. The first sale that was acquired by purchase from another company that had bid it; the second and third sales there was no competition.

Q. You say this sale scheduled on May 31st is one Duke City requested? A. Yes, sir.

Q. That came about I assume as the result of some discussion between you and Mr. Liberman, is that right?

A. I don't understand your question.

Q. Duke City requested that as a result of some conference or consultation between you and Mr. Liberman?

A. I don't recall this was a consultation between Mr. Liberman and myself. I made the request, sir.

Q. Did Mr. Liberman know you were going to make the request? A. I presume that he does.

Q. Would you just presume? Did you talk to him about it at all before you made the request?

A. The request was made in December—

(Testimony of Yale Weinstein.)

Q. I am not asking you when it was made. Did you talk to him at all before you made the request?

A. My recollection serves me that I talked to him about many things. This was shortly after I went into the employ of Duke City Lumber Company and I believe this was one of [895] the things we had discussed.

Q. You and Mr. Liberman had discussed?

A. Yes, sir.

Q. It isn't a case of presuming, you know that he knew you were going to make the request?

A. We talked about many things and I believe we talked about this also.

Q. Is this the plans of Duke City, so far as you know, to make similar requests from time to time for the acquisition of Forest Service timber in the Chevalon working circle?

A. Yes, sir.

Q. Extending indefinitely into the future?

A. I have never thought that far ahead on it, Mr. Romley.

Q. How far ahead have you thought?

A. To this current sale which was requested in 1958, which is currently being put up.

Q. And this sale was talked about with Mr. Liberman shortly after you went to work for him, is that right?

A. I am certain this is one of the things I had discussed with Mr. Liberman.

Q. You say you are familiar with the management plan of the Forest Service, insofar as it affects the Chevalon working circle?

(Testimony of Yale Weinstein.)

A. In a general way.

Q. You know the allowable cut there now is 21 million [896] feet?

A. I believe that is correct.

Q. Let's go back a bit, sir. You said yesterday when you first took the stand and Mr. Moore asked you generally the condition of the mill, you said it was in need of repairs?

A. Yes, sir.

Q. Was it then at that time operating as a mill?

A. It was, sir.

Q. Producing lumber? A. Yes, sir.

Q. In large quantities?

A. Well, I don't know what constitutes—

Q. How much had it been producing for the past three or four years, say '57, '8, '9—well, of course it couldn't have been '59 because we are talking about December of '58.

A. I believe within the range of 20 to 25 million feet, sir.

Q. How long had that mill to your knowledge been producing 20 to 25 million feet?

A. I believe we achieved that production in about 1957 after we made the addition to the sawmill.

Q. The addition to the sawmill was made after the milling contract was entered into with Mr. Liberman, is that right? A. Yes, sir.

Q. At that time the Arizona Timber Company spent some [897] \$150,000, is that not true, approximately?

(Testimony of Yale Weinstein.)

A. I would say approximately that amount, sir.

Q. And up to that time it had been producing in lesser quantities?

A. In lesser quantities.

Q. In what quantities, sir, approximately?

A. Oh, this is an estimate, Mr. Romley.

Q. What capacity were you employed in at that time, weren't you the manager?

A. I don't know what period you are speaking of.

Q. Prior to '57. A. Prior to '57?

Q. Prior to the time you increased the capacity?

A. Yes, sir.

Q. You were the manager of the Winslow mill?

A. Yes, sir.

Q. How much was it producing prior to July, 1957?

A. I can't remember the exact figures.

Q. All right, sir. Do you remember the approximate figures?

A. I would judge we were producing about from 12 to 18 million feet.

Q. Was that after the Aztec contracts were made that you were producing 18 million feet, approximately, bearing in mind that the Aztec contract was on May 21, 1956? [898]

A. I can't specifically recall what the productions were because we had changed our mode of operation from single shift to a shift and a half and without referring to records it would be impossible for me to make an exact reference.

(Testimony of Yale Weinstein.)

Q. Prior to the execution of the Aztec timber contracts in May of 1956, the only source of supply of timber to the Winslow mill, the Arizona Timber Mill, was the Chevalon working circle, isn't that right?

A. Yes, sir. Excuse me, Mr. Romley, did you say the only source of timber?

Q. Yes.

A. My answer to that would be yes.

Q. That came from this allowable cut of 21 million feet for the two mills?

A. Mr. Romley, at that time our allowable cut was not based on an annual basis. If I recall we had an allowable cut of 36 million feet for a three year period.

Q. That is about 12 million a year, isn't it?

A. That is right, sir. However, we had the option of cutting more in one year with the understanding possibly a lesser cut in the following years.

Q. That mill did operate with a production of some 12 million feet a year for several years prior to 1956, isn't that right? A. Yes, sir. [899]

Q. Were you familiar with the production of the Nagel mill in 1952, '3 and '4?

A. Only in a very general way, sir.

Q. In a very general way would you say that the production of the Arizona Timber mill during '52, '3 and '4 was substantially the same in volume and thousands of board feet as the Nagel mill?

A. I would have no basis for making that statement. I would assume it was, sir.

(Testimony of Yale Weinstein.)

Q. Wouldn't you have this as a basis for making that statement, that both of those mills had the same source of supply? A. Yes, sir.

Q. Wouldn't you have also as a basis for that statement the fact that each mill was acquiring from the Forest Service, the only source of supply during those years, substantially the same number of feet with each contract that was left by the Forest Service?

A. It was my understanding the Nagels had a similar allocation, allowable cut as the Arizona Timber Company.

Q. In '52, '53 and '54 then the production was one year 11 million plus in 1952 and 12 million plus in '53 and '54, of the Nagel mill, according to Exhibit 10 in evidence, would you say that was substantially the same production of the Arizona Timber Mill during those years? [900]

A. Is your question was the Arizona Timber Mill production essentially the same as the Nagel mill?

Q. Yes, with these amounts.

A. Without referring to production records, I couldn't make positive assertion, but I would assume they were, sir.

Q. Now, did you start with the Arizona Timber mill in Winslow the last time, was it '47 or '51 and '2?

A. I had been there in '46 and again in '52.

(Testimony of Yale Weinstein.)

Q. You were gone for a few years?

A. Yes, sir.

Q. You had been there continuously since '52?

A. Yes, sir. From '52 to '55 my duties were essentially pertaining to logging and log acquisition, relationship to the Forest Service.

Q. By virtue of that you were more particularly acquainted then with the timber available to the two mills?

A. Particularly acquainted with the timber available to our mill.

Q. As a matter of interest, didn't you learn what your competitor was buying every time a contract came up?

A. In that period of '52 to '55, Mr. Romley, I don't think there were any contracts that were bid, I didn't think so.

Q. Now, you say that the condition, that the mill at the time of its purchase by Duke City was in need of repairs? [901]

A. Yes, sir.

Q. You mean by that some of the machinery and equipment or all of it?

A. Some machinery was in greater need than other machinery.

Q. Do you have an opinion as to the value of any of that equipment in the condition it was in November, 1958?

A. Of any of the equipment?

Q. Yes. A. Yes, sir.

Q. What was that based upon?

(Testimony of Yale Weinstein.)

A. Based upon such experience I have had in pricing and recommending or purchasing similar type, some of that equipment.

Q. And familiarity with the equipment itself?

A. Yes, sir.

Q. What was the sawmill worth at that time?

A. I wouldn't be prepared to even hazard a guess on that, sir.

Q. You haven't the slightest idea?

A. No, sir.

Q. How about the planing mill, what was its value at that time?

A. I wouldn't even hazard a guess.

Q. You haven't the slightest idea, is that right, sir? [902]

A. Specifically for the planing mill?

Q. Yes. A. No, sir.

Q. What was the value at that time of the shop?

A. I wouldn't venture an opinion, Mr. Romley.

Q. Again you haven't the slightest idea, is that right, sir?

A. I wouldn't venture an opinion offhand without making some calculations.

Q. Can you make some calculations now and tell us?

A. I think there is a considerable amount involved there and I wouldn't feel qualified to make an expert appraisal.

Q. What was the value in November, 1958, in your opinion of the carriers and lift trucks?

(Testimony of Yale Weinstein.)

A. All I could say, generally, the carriers and lift trucks were in extremely poor condition.

Q. You told us what the old ones would cost, one of the exhibits shows that, is that right?

A. Yes, sir.

Q. What were these worth at that time, November, 1958, the ones Duke City took over from Arizona Lumber Company?

A. In aggregate?

Q. Yes.

A. My recollection and familiarity with that part of it, [903] there were four carriers and three lift trucks involved.

Q. Four carriers and three lift trucks?

A. Yes, sir.

Q. What were they worth in the aggregate?

A. Based upon offers we had received in trade when we contemplated the replacement of this equipment, the carriers had a value of about 15 to possibly \$3,000.

Q. You mean 1500? A. 1500, excuse me.

Q. I thought you started to say 15,000.

A. 1500.

Q. The carriers from 1500 to 3,000 each, I take it?

A. Yes, sir.

Q. There were four of them. How about the lift trucks?

A. There were two of the lift trucks that I guess had a value of about 2500 each.

Q. How about the third one?

A. The third one was a newer piece of equipment, probably had a value of about \$8,000.

(Testimony of Yale Weinstein.)

Q. \$8,000. So the four carriers had a value of not to exceed \$12,000 if we take the top figure of \$3,000 apiece; and the lift trucks had a value of \$13,000, is that right? A. I believe so.

Q. That is \$25,000 total? [904]

A. Yes, sir.

Q. They are shown on one of these schedules the sum of \$59,550 that was taken into consideration in this calculation for depreciation, is that right?

A. I am not familiar with that.

Q. You are not familiar with that?

A. Mr. Romley, these figures I quoted you are some figures that—

Q. It is your best judgment, isn't it?

A. Yes, sir.

Q. All right. What was the dry kiln worth? There were two of them, weren't there?

A. There were two kilns.

Q. What were they worth in November, 1958?

A. I wouldn't be in a position to place a value on them. I know the condition was extremely bad, we had to do a considerable amount of maintenance work to keep them going.

Q. In their extremely bad condition what were they worth?

A. Mr. Romley, I don't feel qualified to make that estimate.

Q. You haven't the slightest idea?

A. No, sir.

Q. You brought forth a bid here showing what a new one will cost, have you not? [905]

(Testimony of Yale Weinstein.)

A. Yes, sir, but as far as the dry kiln is concerned, I don't believe it is a piece of equipment that if we were to dispose of it we could sell it to anybody.

Q. Well, it had some utility aside from its being saleable, did it not? A. It did.

Q. What was its value to the firm that was going to operate it in a going business?

Mr. Moore: We object to that. The witness has already answered he does not feel qualified to answer that question. [906]

The Court: The objection is sustained.

Q. (By Mr. Romley): Now, there were some stacking sticks, foundation spacers, and roof boards that were purchased by Duke City from the Arizona Timber Company, isn't that right, sir?

A. Yes, sir.

Q. Do you have any idea as to what they were worth in November, 1958?

A. I wouldn't feel qualified to guess what their value was, Mr. Romley.

Q. You haven't the slightest idea?

A. No, sir.

Q. And is the same true with regard to the trucks, trailers and auto patrols and Ford pickups that were there? A. (No answer.)

Q. Or perhaps I could be more specific. You have given us your opinion as to the value of the carriers and lift trucks, they are what we refer to as rolling stock, isn't that right, sir?

A. Yes, sir.

(Testimony of Yale Weinstein.)

Q. And trucks and trailers, auto patrols and Ford pickups are also rolling stock, are they not?

A. Yes, sir.

Q. Do you have any opinion as to the value of the trucks, trailers, auto patrols and Ford pickups there in November of 1958? [907]

A. I have an idea as to what our replacement costs are there.

Q. Were they in good condition, these items, in November, 1958, or were they in poor condition?

A. The trucks I would say were in reasonably good condition.

Q. How about the trailers?

A. The trailers were considerably older and they were in need of a considerable amount of repair and constant maintenance.

Q. How about the auto patrols?

A. There was one auto patrol that has value insofar as work in the woods are concerned, but I wouldn't feel qualified to value them specifically.

Q. How about the Ford pickup?

A. The Ford pickup I would say was in average value for its age.

Q. In aggregate what in your opinion in November, 1958, was the value of the trucks, trailers, auto patrols and Ford pickup in the condition they were then?

A. I don't feel qualified to place a value on them as to their condition at that time.

(Testimony of Yale Weinstein.)

Q. You haven't the slightest idea?

A. No, sir.

Q. Were they worth as much as \$100,000?

A. I wouldn't say, Mr. Romley.

Q. Well, \$50,000? [908]

Mr. Moore: We object, if your Honor please. The witness has stated he is not able to express an opinion as to the value of those particular pieces of equipment at that time.

The Court: Well, what's the question now?

Mr. Romley: If they were worth \$50,000.

Mr. Moore: If they were worth \$50,000.

The Court: He would obviously be guessing.

Q. (By Mr. Romley): Do you have any idea, Mr. Weinstein, as to the value in the aggregate of all of the machinery and equipment, the mill, plant, camps, shop buildings, other buildings that were purchased in November, 1958, by Duke City from the Gallagher interests, Gallagher-Kaplan interests, all of that purchase exclusive of the land?

A. No, sir.

Q. Do you know the value of any of the land that was acquired in that purchase?

A. The value of the land?

Q. Yes, sir.

A. I am familiar with—I am familiar with what was paid for a portion, there was no value established on the land itself, Mr. Romley.

Q. Well, you are familiar with what portion that was purchased?

(Testimony of Yale Weinstein.)

A. As far as land there was the mill site and there was some acreage in the woods. [909]

Q. I believe the mill site, if I am not mistaken, was about 66 acres?

A. I believe that is right.

Q. Some 640 acres, approximately, in the woods, isn't that right? A. Yes, sir.

Q. Now, with which are you familiar then, was it the 640-odd acres or the 66 acres?

A. The 640-odd acres.

Q. Okay. What was the value of the land at that time?

A. I don't know what the value of the land was, I know that it was acquired in a lump sum purchase from Southwest Lumber Mills, which included land and timber.

Q. Did you say a while ago—maybe I misunderstood you, sir—that you did know the value of some of the land that was acquired?

A. I was referring to the 640 acres. However, I suddenly realized that that price included land and timber, and that the land was not valued separately, Mr. Romley.

Q. Well, was the timber on that land valued on so much per net log scale?

A. No, sir, it was a lump sum purchase.

Q. The kilns, the two kilns that are there for '57 and '58 took care of the requirements of the mill when it was producing some twenty or twenty-five million feet of timber, is that right? [910]

A. No, sir.

(Testimony of Yale Weinstein.)

Q. Or of lumber rather?

A. It did not, Mr. Romley.

Q. What did they do with it then?

A. A portion of the lumber was, at additional expense, was hauled to Albuquerque, a portion of it was air dried to keep it from blueing. We were limited insofar as the production available from those kilns, the excess was handled in other unsatisfactory manners.

Q. You received a bid for a new kiln in July of last year, that's almost a year ago—ten months ago?

A. Yes, sir.

Q. And no decision has been made yet as to replacing the kiln, has it?

A. No definite decision.

Q. And in the year 1959, the mill produced some twenty-nine or thirty million feet of lumber, did it not?

A. Yes, sir.

Q. Is it your expectation that during the year 1960 you will produce substantially the same amount of lumber?

A. Essentially the same amount.

Q. Are there any plans to replace this kiln before the end of this year?

A. I am quite certain there are, Mr. Romley. [911] The decision for the installation of the kiln last year was almost definitely made by Mr. Joe Grevey. However, his request or decision was not completely followed through at that time by reason

(Testimony of Yale Weinstein.)

of the fact that we felt that we had another installation that was required that was a little more urgent, and we went ahead on the basis of the installation of the Lawson stacker unit, automatic lumber stacker unit with the understanding that this would merely defer our purchase and erection of a new kiln.

Q. Well, is it contemplated now, Mr. Weinstein, so far as you know that essentially twenty-nine or thirty million feet of timber, of lumber will be produced at the Duke City mill in Winslow during this calendar year without the necessity of making any replacement of the kiln?

A. Mr. Romley, I believe that this decision has already been made for us. There are—the quality of our kiln drying has been so completely unsatisfactory that we must make the installation of the new kiln.

Q. When is the installation to be made, do you know?

A. That decision has not been definitely made. We have had recent discussions.

Q. Are the kilns now in substantially the same condition as they were in November, 1958?

A. Oh, no, sir.

Q. They are worse? [912]

A. We have made considerable repairs.

Q. They are better, condition now is better?

A. The condition now?

Q. Than in '58?

(Testimony of Yale Weinstein.)

A. Than in '58? Well, we hope so because we have added conditioning equipment with the hope that we could better our kiln drying and our most recent word from the experts upon whom we do rely for help, the Western Pine Association have indicated that we still, in spite of our conditioning equipment, we are not getting satisfactory drying.

Q. You can—strike that.

I will ask you the question that Mr. Hickman, I believe was his name, was unable to tell us:

What will it cost to put a new roof on a new kiln of the size that he told us, 60x40 with a gabled roof, 3600 square feet?

A. I couldn't tell you, Mr. Romley.

Q. Mr. Moore said we had a lot of lumber men here that could tell us. Aren't you one of those?

Mr. Moore: No, that was the squares, I think he can figure out the squares for you but you are talking about dollars now.

Q. (By Mr. Romley): Well, how many squares will it take, it's 60x40 gabled roof, is it approximately 3600 square feet of roofing? [913]

A. I am not that familiar with the construction. I believe that Mr. Hickman made reference to a three-ply roof, and I don't know—three-ply wooden building, and I just don't—

Q. All right, let's lay aside the number of squares and accept his figure of 3600 square feet involved. Do you know how much it would cost per thousand square feet? He didn't know that, perhaps you do.

(Testimony of Yale Weinstein.)

A. This would be the price of the lumber?

Q. Yes, sir.

A. I don't know just what kind of lumber Mr. Hickman was going to use in this.

Q. Well, let's assume that you put the type of lumber on it that you feel is necessary, what is the cost of that lumber?

A. It could be \$75 a thousand.

Q. You say it could be? A. Yes, sir.

Q. Is that your best judgment, sir?

A. I would have really no basis for this, Mr. Romley. I don't know what type of lumber they would require. I have never seen a wooden roof on a dry kiln.

Q. What kind of roof is on the kiln you have now? A. We have a metal roof.

Q. In all of your experience and in your training and education about which you testified at length the other day you haven't any idea of the kind of lumber that would go in [914] putting on a roof on a dry kiln, is that what you are telling us?

A. I have never seen a wooden—a dry kiln with a wooden roof.

Q. Well, do you have any idea as to the kind of lumber you'd put on such a kiln?

A. Oh, I imagine you'd put on a grade of number 3 common.

Q. All right. What does grade number 3 common cost Duke City mill?

(Testimony of Yale Weinstein.)

A. I'd prefer going to a price list, Mr. Romley, and seeing what the price is, or are you asking what the cost would be?

Q. What the cost would be, sir, the cost to the Duke City mill that would furnish the lumber for that roof?

A. I'm not that familiar with the prices.

Q. You don't even know approximately?

Mr. Moore: What are you asking—may I inquire is he asking the market price?

Mr. Romley: If he knows approximately the cost to Duke City of number 3 common lumber.

Mr. Moore: The cost of production or the market price, retail or wholesale? I don't understand myself, if your Honor please.

Mr. Romley: I said cost to Duke City.

The Court: That could be many things. [915]

Q. (By Mr. Romley): Well, do you know what the retail, or rather what Duke City wholesales it for to wholesalers?

A. Mr. Romley, I am not that familiar with our current price lists.

Q. Well, we are so near the noon hour will you bring the price list with you this afternoon, sir?

A. Yes.

Mr. Moore: May we approach the bench, your Honor.

(Discussion off the record.)

(Testimony of Yale Weinstein.)

The Court: We will recess until 2:00 p.m.

(Whereupon, a recess was taken from approximately 12:00 o'clock noon until approximately 2:00 o'clock p.m.) [916]

Afternoon Session, 2:00 O'Clock P.M.

YALE WEINSTEIN

resumed the witness stand, and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Romley): Mr. Weinstein, I believe I asked you just before the recess to bring with you a price list of Duke City with regard to timber, is that right, sir? A. Yes, sir.

Q. Do you have such a price list with you?

A. I do have, sir.

Q. May I see it, please.

May this be marked for identification?

(Plaintiffs' Exhibit 23 marked for identification.)

Q. (By Mr. Romley): Is Exhibit 23 for identification the current price list of Duke City?

A. Mr. Romley, I do not know what the current price list is. This one is dated January 10th. That is the only one I have available.

Q. As far as you know that is the last one?

A. I don't know whether it is or not.

(Testimony of Yale Weinstein.)

Q. You know of no other price list existing?

A. There may be. [917]

Q. Does this Exhibit 23 show the prices quoted by Duke City for all of its timber production at the Winslow plant?

A. Mr. Romley, I believe this is an Albuquerque price list.

Q. Do you have a different price list for your Winslow plant?

A. I believe prices are quoted on separate price lists, Winslow and Albuquerque.

Q. Are the prices substantially the same?

A. Mr. Romley, I am not that familiar with the prices in the sales department.

Q. That exhibit before you, can you give us an idea, sir—that won't give you the cost. These are selling prices of Duke City?

A. Yes, sir. We do not keep our costs separate, by producing various grades we have average.

Q. Your costs are certainly less than your selling price? A. I hope that they are.

Q. As a general proposition they are, aren't they? A. Yes, sir.

Q. How much less?

A. I don't think I could answer that question.

Q. You don't know?

A. I don't know. [918]

Q. You are the production manager?

A. Yes, sir.

(Testimony of Yale Weinstein.)

Q. With regard to the No. 3 common, you said I believe would be used in replacing a roof on the kiln. That cost or the quoted price of Duke City as employed in that exhibit is \$83 a thousand, is that right?

A. No. 3 common—what thickness are you speaking of?

Q. What thickness were you speaking of when you said you would use No. 3?

A. Mr. Romley, this was an assumption on my part. I really don't know. I had discussed this matter with Mr. Hickman and I had asked him a similar question as to how we might go about it, and his answer to me was this was primarily an engineering problem and construction problem. I would further assume the cost of the lumber would be a minor part of cost of providing a wooden roof. I would assume that the actual cost of construction would be a material one. I don't know how it would be tied in to the existing kiln.

Q. Every seven or nine years all you would do would be replace the lumber that goes on the roof, isn't that right?

A. I have not had any experience with wooden roof kilns and our kilns do not have wooden roofs, they have metal roofs on them.

Q. You say that one of the planers—I am not sure [919] whether you did or Mr. Steward said that there were two planers that were at the mill when Duke City purchased from Gallagher?

A. Yes, sir.

(Testimony of Yale Weinstein.)

Q. One was the large planer that was generally in use, is that right, sir?

A. That is correct.

Q. That one is still there? A. Yes, sir.

Q. And still being used? A. Yes, sir.

Q. You made, or Duke City did, made an overhaul of that last November, is that right?

A. During the course of the year. The major work was done during November, that is right.

Q. Do you know an overhaul item is something that comes up every couple of years?

A. I haven't had that much experience with operation of planing mills. There is constant maintenance, but this I regard as a major overhaul.

Q. Constant maintenance is charged out in expense as an expense item and reflected in your production costs, isn't that right? A. Yes, sir.

Q. Do you know whether overhaul is similarly charged out [920] as expense and reflected in your operating costs?

A. I frankly don't know how——

Q. We will find that out from someone else. I wondered if you knew about it.

With regard to the other planer, you say was replaced, that was a small one?

A. A small planer.

Q. Sitting outside the building proper, was it not?

A. It could be described as such. Actually we extended the building to put it inside, provide cover for it.

(Testimony of Yale Weinstein.)

Q. That particular planer, that small one, of course had a much lesser cost than the large planer?

A. Yes, sir.

Q. As a matter of fact, it cost not to exceed \$10,000, this small one you replaced, isn't that right?

A. The smaller planer we replaced?

Q. The one you had there cost \$10,000 or less, isn't that right?

A. I would judge that to be a fairly accurate estimate of the cost.

Q. And you replaced that with a used planer that Duke City had at Albuquerque, I believe that is right?

A. Yes, sir.

Q. And the small planer is still there then that was there at the time Duke City purchased? [921]

A. It is under cover in a storage shed in Winslow.

Q. You had no further use for it?

A. No, sir.

Q. Is that right? A. Yes, sir.

Q. How old was it at that time, the small planer?

A. How old was it?

Q. Yes.

A. This would be a guess, Mr. Romley, but I would guess it to be about somewhere between five and seven years old.

Q. It was still in operating condition when it was placed under wraps or under cover?

(Testimony of Yale Weinstein.)

A. It was. One of the reasons for our making that substitution was the continual breakdown and cost of operating that machine.

Q. Insofar as these kilns are concerned, is it true the better dried you get the lumber the better prices you will get for that lumber?

A. The better drying?

Q. Yes.

A. You must be referring to the quality?

Q. Yes, to the quality.

A. This would be a fair assumption.

Q. So with the kilns in the condition they are now, Duke City is getting the prices presently quoted on the market, [922] isn't that right, for that quality of timber?

A. Which prices are you referring to, Mr. Romley?

Q. The lumber which Duke City is presently producing in Winslow—when I say Duke City I mean Winslow as distinguished from any other operation, until I signify otherwise, Mr. Weinstein. The lumber produced by Duke City that is placed in the kilns at Winslow brings a price that Duke City places on that lumber, doesn't it?

A. I believe they do. There may be instances where they don't get the asking price.

Q. Now, if Duke City were to replace those kilns it is your opinion you would get a better quality lumber as the result?

A. Mr. Romley, may I give you the answer in this way, please. Much of the product that we kiln

(Testimony of Yale Weinstein.)

we reuse ourselves in further manufacture and our problem and complaint has come from another department in our own company.

Q. One of your own departments is complaining, that was what you meant by complaints when Mr. Moore asked you the question?

A. The complaints are coming from the ultimate user of the product after further manufacture.

Q. Let's get back to my question, Mr. Weinstein. If Duke City were to get new kilns and place its newly manufactured lumber in those new kilns, it would get a better [923] quality of lumber in your opinion?

A. Yes, sir.

Q. It would command better prices as a result?

A. This might be only an assumption on my part.

Q. Is that a fair assumption? Didn't you take that factor into consideration when you talked about replacing the kilns?

A. Yes, sir.

Q. As a result then the kilns would, in your opinion I assume, pay for themselves by producing lumber of better quality, commanding and getting better prices, is that right, sir?

A. Mr. Romley, I think our greatest motivating factor in that would be to provide a grade of molding and other materials for further manufacture within our own plant so we could ultimately produce certain grades of molding, whatever the requirements are, that will be satisfactory to our customers.

(Testimony of Yale Weinstein.)

Q. That would command a better price and result in a greater profit, isn't that true?

A. Theoretically it would, sir.

Q. Some of the rolling stock was replaced?

A. Yes, sir.

Q. Some does not constitute replacements, but the purchase of completely new equipment that never was there [924] at the Arizona Timber yard, is that right?

A. Are you referring to——

Q. The automatic stacker.

A. The automatic stacker, the lumber stacker?

Q. That is right.

A. That is right. That represents a replacement from a former hand system of piling. We always stacked lumber, Mr. Romley.

Q. I understand. But you never had at the Arizona Timber operation an automatic stacker, that was done manually?

A. It was done manually, yes, sir.

Q. The cost of this automatic stacker then will be compensated for in the savings to be effected by Duke City in the cost of stacking, isn't that right?

A. We would hope to be able to effect a saving and do a better job of stacking.

Q. So the purpose of the automatic stacker was not necessitated by reason of any defective or poorly conditioned equipment?

A. It was not substituted for equipment, sir.

Q. With regard to some of the rolling stock that you referred to in one of these exhibits, I believe

(Testimony of Yale Weinstein.)

it is "K," you show trucks and trailers and trolls and other items, do you not? [925]

A. Yes, sir.

Q. The trucks and trailers, I assume, would be used for hauling the logs from the forest to the pond, is that right? A. That is correct, sir.

Q. Do you know that many mills now contract for that hauling to be done by some third person?

A. That is right, sir.

Q. Do you know that Nagel does that?

A. Yes, sir.

Q. Do you know that that can be—that hauling can be accomplished even at a lesser cost than you could do it yourself by having a third party do it under a contract?

A. Was your question, sir, do I know that?

Q. Yes, do you know that? A. No, sir.

Q. Have you made any studies of that?

A. Not studies.

Q. Have you considered that in any way?

A. Yes, sir.

Q. In your opinion, can the logs be hauled as economically to Duke City by having it done by an independent contractor as it would be for Duke City to do it itself? A. I don't believe so.

Q. Do you have any opinion, sir, as to the difference in the cost in that event? [926]

A. My guess would be about maybe two or three dollars a thousand.

(Testimony of Yale Weinstein.)

Q. Do you know what it is costing you now to haul your timber—not—yes, timber, right. I sometimes confuse that with lumber. I mean logs.

Do you know what it is costing Duke City now to haul the lumber—the timber, excuse me?

A. To haul the timber?

Q. Yes.

A. I would have to refresh my memory with reference to our cost sheets.

Q. Do you know what is being charged for that same work by the party supplying Nagel or hauling for Nagel?

A. I am not exactly certain what their arrangements are there.

Q. Well, then, when you said two or three dollars a thousand, that's strictly a guess then?

A. It's based upon a conversation that I had with a hauling contractor within the past year, discussing with him the possibility of contracting this portion of our operation to him.

Q. When you discussed it with him, did you have in mind what it was costing you to do that?

A. I did at the time, sir.

Q. But you don't remember it now?

A. I don't recall the specific number. [927]

Q. Not even approximately?

A. No, sir.

Q. You say that on October 8th, I believe it was, you met, or went, I think, with Gallagher and Wickens, yourself and maybe Bob Gallagher to Liberman's office?

(Testimony of Yale Weinstein.)

A. Mr. Romley, I believe that was October 9th. I'm not positive about the date.

Q. Did you go to Liberman's office only once during that period of 8th, 9th and 10, or was it more?

A. Well, I had accompanied Robert Gallagher and Thomas Gallagher on the date that I believe to be the 8th.

Q. On the 9th? A. On the 8th.

Q. Well, Wickens was there on the next day?

A. On the following day, yes, sir.

Q. Now, the first time that you went there on the 8th was with the two Gallaghers and yourself only? A. Yes, sir.

Q. I believe you said that you had been contemplating a purchase by a syndicate to be composed by the three of you plus a Mr. Wickens, is that right?

A. That consisted of all of whom were the officers of the New Mexico Timber Company or the Gallagher companies. The group was composed of Tom and his brother, Bob, Tom Cavanaugh, Charlie Wickens and myself. [928]

Q. I see. And I assume that this group including yourself had given some careful study to the advisability of purchasing the Gallagher properties, that's true, isn't it?

A. I don't know what you refer to as careful study, but we had——

(Testimony of Yale Weinstein.)

Q. Did you give any study to the advisability of making that purchase?

A. We had discussed it amongst ourselves.

Q. Had you made any projections of the timber that could reasonably be expected for the next ten or fifteen or twenty years?

A. There were no projections made, sir.

Q. Were there any discussions at that time with regard to the profits that the syndicate or group might reasonably expect to realize if it acquired the property?

A. There were no such projections made.

Q. I assume that you contemplated—this group did of which you were a part—taking over a going business and operating it as a going business, is that right, sir?

A. This is what was contemplated.

Q. And you contemplated at that time this would be done at a profit and not at a loss, isn't that right?

A. Yes, sir.

Q. You expected to make a reasonable profit in that work?

A. Yes, sir. [929]

Q. What did you contemplate at that time was a reasonable profit?

A. I made no such projections or contemplations, as far as I was concerned I was an employee and this appeared to be an opportunity to participate in the purchase with the Gallaghers.

Q. You would not have been a mere employee under that situation, would you?

A. No, sir.

(Testimony of Yale Weinstein.)

Q. Well, as one of the prospective future owners did you seek to determine for yourself or to calculate in any way what might reasonably be expected in the way of profit from the operation of the Gallagher properties? A. No, sir.

Q. If your group should purchase it?

A. No, sir, we made no such projections.

Q. Did you make any projections at that time as to how much timber would be milled during any one, two, three, four or five years, or any period of time?

A. We made no such projections, Mr. Romley. We were all working with these properties and I guess now we just felt that we had sufficient familiarity with them.

Q. Was there any discussion with them as to the amount of net profit, percentagewise, that you could expect to make based on the selling price of the lumber produced? A. No, sir. [930]

Q. Do you now have any opinion, sir, as to the profit that can be made from such an operation, assuming a good and efficient operation?

Mr. Moore: Your Honor, I do not believe that a proper foundation has been laid for Mr. Weinstein to express an opinion. He has indicated he is not familiar with a lot of cost items and so forth.

The Court: Well, he may—he is not qualified or not able to have it or doesn't have any opinion, he just said so.

Q. (By Mr. Romley): Do you have any opinion at all on that, sir?

(Testimony of Yale Weinstein.)

A. I don't have an opinion on that, Mr. Romley.

Q. Now, I assume that you were familiar with the cost of operation and production of the two mills, the Nagel and the Arizona Timber mill there in 1958 and in prior years, is that right, sir?

A. Am I familiar with?

Q. Were you familiar with them at that time?

A. Was I familiar?

Q. Yes.

A. I was familiar to the extent that we had made comparisons of costs.

Q. When you made those comparisons of costs did you find that the costs were substantially or approximately the same, that is of the two [931] mills.

A. I believe at the time that we made those comparisons, Mr. Romley, that we found that overall the costs were essentially the same. They went over in some instances and we went under. There were a few differences in the manner of keeping costs between the two companies.

Q. But all costs of producing lumber were substantially and approximately the same as between the two?

A. My recollection serves me that they were essentially the same. I have no records or any notes of any comparative costs that were made.

Q. And that comparison was made, I believe, in '57, was it not?

(Testimony of Yale Weinstein.)

A. I believe we had made several—I mean at various times I think we had made comparisons, I don't at the moment—

Q. Do you recall when the latest comparison was made with reference to the Fall of 1958?

A. I believe that there were comparisons made sometime in the early Spring of 1958.

Q. And several times before that?

A. Yes.

Q. And in each instance these comparisons showed that your costs were essentially the same?

A. My recollection serves me that there were no great differences.

Q. Now, your—at least one of your purposes in going to [932] Mr. Liberman's office with the two Gallaghers and Mr. Cavanaugh on October 9th was to see if Gallagher would be willing to allow this group to continue the milling contract that had been entered into by Arizona Timber with Duke City, isn't that right?

A. Whether Mr. Liberman would be willing?

Q. Yes.

A. Yes, that was one of the things that we had discussed with him.

Q. Now, was the group in your opinion, or at least you as a part of that group, anxious to continue with that contract?

A. Well, I don't know whether it was a question of being anxious, Mr. Romley. This was one of the things that, in our discussions with Mr. Gallagher, we had discussed and we weren't completely clear

(Testimony of Yale Weinstein.)

on it, as I recall, and it is somewhat vague as to the exact details. Tom advised us that he had discussed a multitude of things, overall mergers, merger of part of the operation and we more or less went over to discuss with Mr. Gallagher to have us discuss some of the things that he had gone over with Mr. Liberman.

Q. And was it your opinion, sir, based on what Mr. Gallagher had said to you, that this was a profitable contract for the new group to continue with if at all possible?

A. I don't recall if there was any discussion as to whether or not it was profitable. This was only one of the [933] things that was in question and we discussed it with Mr. Liberman.

Q. But you did want to continue that contract if at all possible?

A. Well, we wanted to know if it was Mr. Liberman's understanding that that contract would continue.

Q. Well, wasn't it more than that? Didn't your group want to continue that contract?

A. I don't recall if there was any particular expression of the group insofar as the continuation of that contract, Mr. Romley.

Q. Well, is it fair to assume, sir, that if it was not a profitable contract you would not have been seeking to have it continued?

A. I believe that is a fair assumption, Mr. Romley.

(Testimony of Yale Weinstein.)

Q. All right, we will get at it that way. I think you have told us that in '58, did you say that Nagel stepped up its production by the installation of a line bar resaw?

A. Yes, I stated that they had stepped up their production with the installation of a line bar resaw, I was not certain as to the year that it was installed.

Q. Relatively recent?

A. Comparatively recent, yes, sir.

Q. And that's the only thing that Nagel did to your knowledge insofar as the acquisition of additional equipment [934] was concerned, or machinery to step up production?

A. I am not that familiar with their operation, Mr. Romley, but I believe that that, and I'm not certain whether they added any production to their planing mill.

Q. Well, do you know of anything more that they added other than——

A. Specifically, no sir.

Q. Do you know the cost of that line bar resaw?

A. I don't know the cost of their line bar resaw, no, sir.

Q. Do you have a line bar resaw in the Duke City mill? A. Yes, sir.

Q. Do you know what that cost?

A. Well, I know that our whole installation that went with the line bar and the revamping, I believe, represented in excess of \$100,000.

(Testimony of Yale Weinstein.)

Q. Well, you say the whole thing that went with it, I don't know what else went with it.

A. Well, I'm sorry. There were foundations and buildings that had to be added to conveyor chains and cross conveyors, merry-go-rounds, we had to move the burner.

Q. Now, is the increased production also a result of the hiring of more men to do the work, a double shift?

A. I'm sorry, I don't understand that question, Mr. Romley.

Q. Well, the increase in production is effected not only [935] by the purchase and installation of a line bar resaw, but also the employment of more men to do the work, isn't that right?

A. The line bar resaw does necessitate more men over the former method of operation without the line bar resaw.

Q. Now, is Duke City operating one or two shifts?

A. At the present time we are operating two shifts, sir.

Q. Now, how long has there been a two-shift operation at that particular mill, either by Duke City or its predecessor?

A. I can't recall the exact dates. We have operated a double shift there for at least three years, I'm sure. Prior to that time, we had operated on what we referred to as a split shift, which is 60

(Testimony of Yale Weinstein.)

hours a week, and we had been on a single shift. But the exact date at which those various changes took place I would have to refer to records.

Q. When the production was reduced from its present approximately twenty-nine or thirty million to sixteen million, or to twelve million, or to ten and a half million, then in your opinion would one shift be able to take care of that?

A. Oh, I think that we would have capacity in excess on a one-shift basis, that is we'd have a saw mill that was geared to more than that.

Q. One shift could adequately take care of that then?

A. One shift?

Q. Yes.

A. I don't believe that it would be on a—it wouldn't [936] be economical, I don't believe, with our present type of operation.

Q. If you had two—you said for the present type of operation, you mean for the present twenty-nine to thirty?

A. For the present saw mill that we have.

Q. Well, if you had two shifts would you use a fewer number of men to produce the twelve million feet than you use to produce twenty-nine or thirty?

A. Oh, yes.

Q. In that event the mill would go back to the operation of the type it carried on in '52 or '53 and '54 when its production was around eleven or twelve million, is that right?

A. Well, we have a different mill now than we had at that time, Mr. Romley.

(Testimony of Yale Weinstein.)

Q. Well, you have a mill that has had this line bar resaw added to it, is that right?

A. That's right.

Q. And substantially that's all that's been added, isn't that right?

A. No. Well, we added all of the machinery that went with it, the conveyors and we moved our burner as a result of this line bar installation, and there is a matter of balance that I think we would lose in trying to just take this same operation and gear it to twelve million feet. We have a different type of mill. [937]

Q. Now, do you—you have told us that—strike that, please. Do you know what the net log scale was last year with regard to the lumber produced by Duke City at Winslow?

A. Do I know what the net log scale was?

Q. Yes, of the timber you used in producing that twenty-nine or thirty million feet of lumber at Duke City?

A. No, I don't. I am not able to recall or tell you what the footage was in terms of net log scale.

Q. Do you have anything here available that will tell us that? A. I don't have anything.

Q. Have you ever seen the schedules that are attached to the answers to the interrogatories?

A. Only very briefly.

Q. I think we have referred to some of them here in the evidence. Directing your attention to schedule C which is attached to the answers to the interrogatories, do you see there, sir, a total?

(Testimony of Yale Weinstein.)

Mr. Moore: Answering which interrogatory, Mr. Romley? It would appear on the first page.

Mr. Romley: No, it does not. It tells us Duke City Lumber Company, cost of stumpage and brush, Winslow, December 1, '58, to December 31, '59. Schedule C.

Mr. Moore: That's just a part of it. That's answering interrogatory number 40, I believe. That's one of the schedules. [938]

Mr. Romley: Yes, it is.

Mr. Moore: That's Schedule C.

Mr. Romley: Schedule C, yes, answering interrogatory number 40.

Q. (By Mr. Romley): Do you see there the figure, total with regard to stumpage of 26,225,779?

A. I do, sir.

Q. Was that the net log scale that year?

A. I haven't check those figures, but my answer would be yes. Mr. Cavanaugh prepared those and it would be accurate.

Q. And do you see from the same schedule that there was a total of 30,048,803 feet of lumber produced?

A. I see that, yes, sir.

Q. That represents an overrun of a little better than 15 percent, does it not?

A. If that is what the arithmetic works out to.

Q. You made reference, I believe, Mr. Weinstein, to a stacker that you said you would have to buy or perhaps you thought might be purchased costing some \$66,000. Do you remember that?

(Testimony of Yale Weinstein.)

A. Yes, sir.

Q. What would that replace, if it is acquired?

A. It would come closer to replacing a piece of machinery that we call a 977 Caterpillar Tractor, it's a track-type hydraulic fork lift. [939]

Q. Would that result in economies so far as costs of production are concerned, in your opinion?

A. Mr. Romley, I think that the one thing that it would preclude which ultimately would result in economies, I think it would preclude the possibility of the mill running out of logs. It would enable us to start building our inventories during the blueing season.

Q. Do you know of any mill in the southwest that uses a stacker such as that you have just mentioned.

A. Yes, sir.

Q. Where?

A. The Whiting or Kaibab mill at Fredonia.

Q. Of this same size and capacity?

A. A lesser size and capacity. I have judged our needs on the basis of conversations I have had with them where they have indicated that the larger machine should be used.

Q. Do you know how much lumber they are producing?

A. I don't know what their production is, no, sir.

Q. Is the stacker of the size you have mentioned one that you feel you would need for a continued production of thirty million feet?

(Testimony of Yale Weinstein.)

A. It is one that we would need, I think we are going to need it for this coming year unless we have very favorable conditions, weather conditions.

Mr. Romley: I believe that's all. [940]

Redirect Examination

Q. (By Mr. Moore): Mr. Weinstein, as a fact is Duke City Lumber Company now hauling rough grain and other lumber from Winslow to their plant in Albuquerque for drying?

A. They are, sir.

Q. This stacker, automatic stacker that Mr. Romley asked you about, is it your opinion or observation from that that that installation has resulted in a more economic, efficient operation?

A. We hope that it will contribute to that, yes, sir.

Q. With respect to the production up there and the two shifts, are you running the planer on two shifts or one shift?

A. We operate our planer on a single shift basis.

Q. Even though you are producing thirty million feet a year? A. Yes, sir.

Q. Also with reference to what Mr. Romley asked you about the conferences that were held with respect to the group which, I believe he referred to as a possible syndicate buying out the Gallagher properties or Arizona properties of the—or all of it, had that been accomplished would the management have been the same that it was before that,

(Testimony of Yale Weinstein.)

same personnel in management, actual management of the company that had been with the Arizona Timber Company and New Mexico Timber Company?

A. That [941] was contemplated. yes, sir.

Mr. Moore: I believe that's all.

Mr. Romley: Your Honor, there is one thing I neglected in my——

Mr. Moore: Oh, excuse me, there is one other thing I did.

Q. (By Mr. Moore): Mr. Romley asked you, Mr. Weinstein, if you had any reason to believe or fear that Duke City would not get or not be the successful bidder at the sale that has been advertised on the Limestone unit, and you answered yes, and he went on. Will you tell me what the reason was that you based that answer on?

A. Mr. Moore, I have already had indication or I have been approached by other persons in the lumber business requesting information as to whether or not we had a sale coming up in the Sitgreaves Forest, and if so, when it was coming up and how large the volume was and whether or not we had any timber in that particular area that we could spare for another mill that they had, because they didn't quite have enough in their allowable cut to maintain the efficiency of their operation.

Q. What mill was being referred to in that conversation?

A. Well, specifically the Whiting Mill at Payson was referred to in that conversation.

Mr. Moore: That's all. [942]

(Testimony of Yale Weinstein.)

Recross Examination

Q. (By Mr. Romley): You know the operator of the Whiting mill, do you? A. Pardon?

Q. You know the operator of the Whiting mill?

A. Well, I know Mr. Whiting, yes.

Q. Is he the one who talked to you about whether you could spare any timber?

A. I was approached by both Mr. Lee Kutch, whom I understand is no longer in that management group, and Mr. Milton Whiting.

Q. And do you understand now they are not going to bid? A. No, sir.

Q. Do you understand now that they are going to bid?

A. I would hope that they wouldn't.

Q. Do you understand now that they are going to bid?

A. Our conversations did not go beyond that point.

Mr. Romley: Your Honor, there is one thing I neglected on my cross. May I go into it? It's a very brief one.

The Court: Very well.

Q. (By Mr. Romley): I started on it, and then got sidetracked some way when I asked you about you and Tom and Bob Gallagher and Tom Cavanaugh going to see Mr. Liberman on October 8th when you spoke, I think you said the 8th when you spoke to him, asked him if he would be agreeable to allowing [943] the milling contract to continue.

(Testimony of Yale Weinstein.)

Now, at that time I believe you said, on direct examination, that Mr. Gallagher informed Mr. Liberman that the group either had purchased or was negotiating for the purchase of the Gallagher properties, am I correct in that, sir? [944]

A. Mr. Romley, I am not positive about these dates.

Q. - Either the 8th or 9th?

A. This was the second visit.

Q. In any event you do recall on the 8th or 9th of October that Gallagher said to Liberman in effect: "We have bought or we are negotiating for the purchase of these Gallagher properties."?

A. It was reference similar to that, yes, sir.

Q. I think you said that Mr. Liberman replied and said in effect: "That can't be, I have a commitment I am going to buy it," or "I have a deal"?

A. I think his answer was something like: "I can't give you an answer on that. I thought I had a deal. I thought I had a deal," and at that time some reference to making a trip to New York.

Q. Did he say he thought he had a deal under that letter of September 12th?

A. I don't believe there was a specific reference to the date. I think it was merely a reference to it.

Q. Did either Tom Cavanaugh say at that time, either he or Mr. Gallagher say at that time to Liberman: "You don't have any deal, that has been called off, it was called off on September 18th," words to that effect?

(Testimony of Yale Weinstein.)

A. Your reference to Mr. Gallagher, Mr. Robert Gallagher?

Q. Mr. Tom Gallagher. [945]

A. Mr. Cavanaugh was not present at any of the meetings where Tom Gallagher—

Q. I am confused there too. Let me see if I can pick it up again. When this statement was made to Liberman to the effect that the speaker wanted to know if they could continue on with the milling contract if they concluded the purchase of the Gallagher properties, when that statement was made who was present?

A. Statements similar to that were made two days, Mr. Romley, once on the 8th when Mr. Robert, Tom Gallagher and myself were present; it was made again the following day when Mr. Tom Gallagher was not there, but the balance of the group were there with Mr. Liberman.

Q. On the 8th who was there?

A. On the 8th, Tom Gallagher, Bob Gallagher, and myself.

Q. On the 8th did Tom Gallagher make any statement of similar import to the effect: "We have bought or are negotiating for the purchase of the Gallagher properties"?

A. Yes, sir.

Q. Did he at that time inquire about continuing with the milling contract? A. Yes, sir.

Q. And did Mr. Liberman make any statement or response at that time?

(Testimony of Yale Weinstein.)

A. His response was: I don't think, or I can't give you [946] an answer, there are questions I want answered. I am contemplating a trip to New York and the meeting was kind of broken up at that point.

Q. Did he say at that time, "I have a commitment," or "I have a deal on it"?

A. I don't recall his exact words. I think the reference he made to was: "I think," or "I thought I had a deal," or "I had a commitment," or "I thought I had a deal." I don't recall. This was the general tone of the conversation.

Q. When he said, "I thought I had a deal on it," did Tom Gallagher dispute that?

A. To my recollection he did not dispute it.

Q. Was any reference made at that time to a call from Cavanaugh under instructions from Tom Gallagher made to Liberman?

A. No, sir. Following Mr. Liberman's response he made reference to a trip to New York and that was the beginning of the end of the meeting, whereupon Tom's brother Bob, after exchange of words and such, Bob kind of led Tom out of the office.

Q. After all that happened Liberman and Gallagher discussed buying the properties together?

A. Apparently the next morning.

Mr. Romley: That is all. [947]

(Testimony of Yale Weinstein.)

Redirect Examination

Q. (By Mr. Moore): Mr. Weinstein, so that we are clear on the record, Mr. Romley keeps referring in his questions about these October 8th, 9th and 10th negotiations to the group buying the Gallagher properties. He has heretofore defined that to limit it to the property in Winslow. Now, were you negotiating, this group negotiating with respect to buying Tom Gallagher's interest in the property or the Kaplan interest in all the Kaplan properties in New Mexico and Arizona?

A. The Kaplan interests, Mr. Moore.

Q. It was the Kaplan interests that you were discussing and negotiating for? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. So that we are clear, the Kaplan interests that you referred to applied to the properties of which companies?

A. They apply to all of the companies.

Q. Name them. Was that New Mexico Timber Company?

A. New Mexico Timber Company, the Arizona Timber Company.

Q. Also Bernalillo or were the Kaplans in the Bernalillo Lumber Company?

A. They were in the Bernalillo Lumber Company. [948]

Q. That applied to all the Kaplan's interest, both in New Mexico and Arizona?

(Testimony of Yale Weinstein.)

A. It applied to both. Mr. Moore, these were a little bit fantastic, some of these deals.

Q. I wanted to limit it so we would identify the property that we are talking about that you were negotiating for.

A. I believe it—if your question was did it only pertain to the Arizona properties——

Q. No, my question was, Mr. Weinstein,—I am sorry, I don't make myself clear. Were you referring to the interests that Kaplan owned in all of the properties you have talked about both in New Mexico and Arizona?

A. Yes, sir.

Q. And not just the Arizona property?

A. Yes, sir.

Q. Does that also include some land in what may be known as the San Diego land?

A. Yes, sir, it included the land. It was the Kaplan interests in entirety.

Mr. Moore: That is all.

Recross Examination

Q. (By Mr. Romley): With regard to that, Mr. Weinstein, did I understand [949] from what you just said that Tom Gallagher would remain in the syndicate with the interest he then had and that the rest of you, namely you, Wickens, Bob Gallagher and Tom Cavanaugh would together purchase the Kaplan interests?

A. No, that wasn't the deal.

Q. Was Tom Gallagher also to purchase part of the Kaplan interests?

A. Yes.

(Testimony of Yale Weinstein.)

Q. How big a deal was that money-wise?

A. In excess of one million dollars, sir.

Q. Do you know how much in excess?

A. No, sir, I don't recall at the moment. Mr. Gallagher was taking care of the financial commitments.

Q. Did Mr. Tom Gallagher in the final analysis acquire these other Kaplan interests?

A. He acquired the New Mexico.

Q. New Mexico operation and Liberman and Duke City acquired the Arizona operation?

A. Yes, sir.

Mr. Romley: That is all.

Mr. Moore: That is all.

(Witness excused)

THOMAS CAVANAUGH

recalled as a witness, having been previously duly sworn, [950] testified further as follows:

Direct Examination

Q. (By Mr. Moore): You are the Tom Cavanaugh that we have heard mentioned here several times? A. Yes, sir.

Q. I believe you were sworn and on the stand the other day? A. That is right.

Q. Where do you live, Mr. Cavanaugh?

A. Albuquerque, New Mexico.

Q. How long have you lived there?

A. I have lived in Albuquerque since March of 1948.

Q. What is your occupation?

(Testimony of Thomas Cavanaugh.)

A. At the present time I am comptroller of Duke City Lumber Company.

Q. How long have you been in the employ of Duke City Lumber Company?

A. Went to work for Duke City Lumber Company on March 15th, 1959.

Q. Before that by whom were you employed?

A. Before that I worked for Tom Gallagher for New Mexico Timber Company and Arizona Timber Company for approximately eleven years, from March, 1948. [951]

Q. Was the employment with Mr. Gallagher the first employment you had, or did you have some work before that?

A. Before that I worked with Peat, Marwick & Mitchell & Company in Denver, a public accounting firm.

Q. Have you had training as an accountant?

A. Yes, sir, I graduated in accounting from Ohio State University.

Q. Are you a Certified Public Accountant?

A. Yes, sir.

Q. You of course are acquainted with Mr. Jenkins and Mr. Dale Nelson, are you not?

A. Yes, sir.

Q. On September 23rd, 1958, did you see Mr. Jenkins and Mr. Nelson in Mr. Gallagher's office in Albuquerque?

A. Yes, I did. On the 23rd both Bob Jenkins and Dale Nelson came over to the office and I

(Testimony of Thomas Cavanaugh.)

think I talked with them briefly and we walked into Mr. Gallagher's office. And after a few preliminaries Dale Nelson and I walked over into my office.

Q. Did you see Mr. Nelson and Mr. Jenkins leave?

A. I don't remember, Mr. Moore, whether Dale Nelson went back from my office into Gallagher's office or they came through the office. I do of course know they left.

Q. When did you next see Mr. Gallagher after they left?

A. It was a few minutes after they left that Tom came [952] storming into the office, kind of upset.

Q. Did he make any statements about Mr. Liberman? A. Yes.

Mr. Romley: Just a moment, if your Honor pleases, we object to that on the ground it is hearsay.

The Court: Objection sustained.

Q. (By Mr. Moore): You say he appeared to be upset? A. Yes, sir.

Q. Did he appear to be mad?

A. Very mad.

Q. On the 18th did he give you any indication by word or otherwise as to whom his anger was directed?

Mr. Romley: We object to that as calling for a conclusion, if your Honor please. It is immaterial.

Mr. Moore: I think it is admissible, your Honor,

(Testimony of Thomas Cavanaugh.)

under the fact the condition he observed. We have had other evidence pertaining to that.

The Court: The objection is sustained.

Q. (By Mr. Moore): On the 18th of September, Mr. Cavanaugh, 1958, did you receive a call from Mr. Gallagher to convey a message to Mr. Liberman?

A. Yes, sir, I did.

Q. Where was Mr. Gallagher at the time, if you knew where he was calling you from?

A. I did know he called from San Francisco.

Q. You [953] were in Albuquerque?

A. Yes, sir.

Q. Did you deliver the message by telephone or otherwise to Mr. Liberman in response to Mr. Gallagher's telephone call to you? A. Yes sir.

Q. What message did you convey to Mr. Liberman?

A. I conveyed the message Gallagher told me to relay, in just so many words, the deal was off, with no further explanation.

Q. That is all you told Mr. Liberman?

A. Yes, sir.

Q. On September 29th, 1958, do you recall whether or not you accompanied Mr. Gallagher to Flagstaff? A. I did.

Q. Who did you see in Flagstaff?

A. When we arrived at the airport at Flagstaff, Lee Kutch and Milton Whiting and Walter Bushman of the Kaibab Lumber Company picked us up and we went down to their office.

(Testimony of Thomas Cavanaugh.)

Q. What was the purpose of your going to their office?

Mr. Romley: We object as entirely immaterial. At that time the Nagels had told him in accordance with this understanding they were no longer interested.

The Court: Of course I don't know what the——

Mr. Romley: I think I am anticipating something, your [954] Honor.

The Court: He may answer. I will disregard it if it isn't material.

A. Gallagher was trying to negotiate in the sale of the Winslow property to Kaibab Lumber Company.

Q. (By Mr. Moore): Those negotiations were conducted there in your presence so you had personal knowledge of them? A. Yes, sir.

Q. You have been in the courtroom I guess all the time since we started, haven't you, Tom?

A. Right.

Q. At least you were here this afternoon when you heard discussion about the October 8th, 9th and 10th meetings in Albuquerque with various people that Mr. Weinstein mentioned? A. Yes, sir.

Q. Were you a part of that group in the syndicate, as Mr. Romley referred to it?

A. Yes, I was.

Q. And the other people were the ones you heard Mr. Weinstein name?

A. That is right, Tom Gallagher, Bob, Charley Wickens and Yale.

(Testimony of Thomas Cavanaugh.)

Q. When was the first meeting and the date of that group you participated in, so I will know which one to ask [955] you about?

A. The first meeting was in Tom's apartment on October 9th.

Q. Who was present—this was the first meeting you attended, that is what I mean?

A. In that cycle of three days, you mean?

Q. Yes. A. Yes.

Q. Who was present?

A. Tom Gallagher, Bob Gallagher, Charley Wickens, Yale Weinstein and myself.

Q. Was Mr. Liberman there? A. No.

Q. Were you present at a meeting in which Mr. Liberman was present at any time with the group or any part of the group?

A. Later on the 10th Bob Gallagher, Charley Wickens and Yale and myself were up to talk to Mr. Liberman at his office.

Q. About this negotiation that had been going on? A. Right.

Q. Was there any discussion there at that time about the assignability of the milling contract between Arizona Timber Company and Duke City Lumber Company at the Winslow plant?

A. Yes, sir. [956]

Q. Just what was said about it, the best you recall, the substance of it?

A. The best I recall that was really the purpose of our visit, to see if the group purchased the New Mexico Timber assets and Arizona Timber as-

(Testimony of Thomas Cavanaugh.)

sets, whether or not Maurice would continue under the milling agreement. And I recall that Bob Gallagher was more or less the spokesman for the group and he asked Mr. Liberman if he would continue under this milling agreement if the group would purchase and—of course there was quite a bit of preliminary discussion about it and what not—Mr. Liberman said no, he felt he had a deal on this letter of September 12th and that if he didn't he would rather not be associated in any way with a group such as ours.

Q. Did you leave right away? A. Shortly.

Q. Did you make any investigation or were you with a part of a group that did make an investigation with respect to the legal assignability of that contract? A. Yes, sir, I was.

Q. Where did you do that or where did you go?

A. Immediately after we left Mr. Liberman's office we went down to our Company attorney regarding this matter and to find out, because all of our negotiations with the bank had been on the hopes we could assign this agreement. So we went down to Judge Moise's office, our attorney, as [957] to whether or not the contract could be assigned. It was his opinion—

Mr. Romley: Just a moment, please.

Q. (By Mr. Moore): I am afraid that is hearsay, Mr. Cavanaugh, a little fearful it might be.

Were you in New York at any time during the negotiations that you heard discussed here in the

(Testimony of Thomas Cavanaugh.)

courtroom between Mr. Liberman and the Gallagher and Kaplan interests? A. Yes, sir.

Q. When did you go to New York?

A. Bob Gallagher and I left for New York on Monday afternoon the 13th of October.

Q. You traveled by air? A. Yes, sir.

Q. Had you been requested by someone to come to New York?

A. Yes, we were. Tom Gallagher called from Phoenix or some other place and said he would meet us in New York.

Q. Were you present in New York during any of the negotiations that you heard discussed here in the courtroom in Mr. Liberman's room at the Essex House or in Mr. Jack Kaplan's home the evening of October 15th? A. No, sir.

Q. When did you leave New York?

A. On the afternoon of the 15th I received a call from Gallagher and he said it looked like the deal wasn't going [958] to work out and I might as well start back. I wanted to visit some friends in Washington, so I left the afternoon of the 15th to come back to Albuquerque.

Q. Where did you go?

A. I stopped over night in Washington.

Q. Did you get a call from Mr. Gallagher while you were in Washington to return to New York?

A. Yes, about three o'clock in the morning he called and said he thought perhaps there was going

(Testimony of Thomas Cavanaugh.)

to be a deal and if there was I would have to work out the figures on the inventories and the transition period—

Q. I don't want the conversation, just the fact you were called. Did you fly back to New York?

A. Yes, sir.

Q. Did you meet Tom Gallagher on the morning of October 16th? A. Yes.

Q. Where did you meet him?

A. As I came in from the airport I went down to Mr. Burlach's office, the attorney, and met Tom down at the bottom of the building just as he was coming out of the door.

Q. Did you go some place with him?

A. Yes, sir. He said we had to be up at the Essex House as soon as possible. I think that must have been sometime [959] after ten. Immediately we took a cab up to the Essex House.

Q. Who did you see at the Essex House?

A. Mr. Liberman and Mr. Rosenthal.

Q. What time did you arrive at the Essex House?

A. I don't know exactly, but I would say near eleven o'clock.

Q. Where did you see Mr. Liberman and Mr. Rosenthal?

A. We went up to Mr. Liberman's room.

Q. Was there any negotiations there at that time with respect to the ultimate purchase of this property at Winslow by Duke City Lumber Company?

A. No, sir, other than—

(Testimony of Thomas Cavanaugh.)

Q. What happened when you got there, tell us briefly what occurred.

A. I don't recall when we walked in what words were said, whether everybody shook hands or how it worked out. Apparently Mr. Liberman—we knew then we had a deal because we sat down and tried to figure out again how we were going to turn over different stages of the operation.

Q. Someone said, "We have a deal," or words to that effect?

A. Probably words to that effect.

Q. And then did Mr. Gallagher remain there or did he leave?

A. I think we all sat around and talked until about [961] twelve-thirty, something like that. I know we called Mr. Weinstein in Albuquerque and found out more details. Then we went down to the dining room and Tom Gallagher excused himself and said he wanted to go down and start preparing the first draft.

Q. Where was he going to do that, did you know or did he tell you?

A. He told us and I knew, it was Mr. Burlach's office.

Q. That is the attorney for the Kaplan interests in New York?

A. Yes, sir.

Q. Did you remain there in the hotel with Mr. Kaplan and Mr. Rosenthal?

A. Yes, I did. We had lunch.

(Testimony of Thomas Cavanaugh.)

Q. Do you have any recollection as to the approximate time that you finished lunch?

A. No, I don't exactly. I suppose sometime between one and two o'clock.

Q. And were you going at that time to continue with Mr. Liberman and Mr. Rosenthal with respect to figures, calculations and so forth, was that the plan?

A. I think we were going to discuss more details on it!

Q. As you went or started back to Mr. Liberman's room, did you see him get or see in his hands a telegram?

A. I think after lunch that we walked out into the [961] lobby and went up to the box and as I recall it there was a telegram. And he looked at the wire and handed the wire to Mr. Rosenthal, they both glanced at each other and whatever, if we were going to discuss anything else, I don't know, because I was excused. They both asked if they could be excused so I left them and went back to my hotel.

Q. How long did you remain in New York?

A. I was in New York until Saturday.

Q. And Saturday would have been approximately what date, if you recall, Tom?

A. The 18th.

Q. Of October? A. Yes, sir.

Q. This is all in 1958 we are talking about?

A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. Before you left New York was the memorandum of agreement that has been discussed, prepared, initialed and approved by the parties?

A. Yes, it was.

Q. And then you returned to Albuquerque?

A. Yes.

Q. When did you commence work for Duke City Lumber Company? A. On March 15th, 1959.

Q. Did you solicit that job or did they solicit you or [962] how did that happen you went to work for them?

A. Well, the way it worked out, Gallagher—I could see that Tom was working toward some sort of liquidation and I told him I thought it would be best if I resigned because I was working partly for Bob Gallagher or one company and partly for Tom Gallagher or another company, which was an untenable position to say the least. So I put in my resignation, put up my house for sale and happened to be over in Duke City's office talking about the change over sometime in February or March and Mr. Liberman mentioned that he had heard from Mr. Weinstein I had my house up for sale and before I did anything to be sure and contact him.

Q. You did contact him and you are now working for Duke City Lumber Company?

A. Yes, sir.

Q. Mr. Cavanaugh, are you the one who prepared the schedule answering interrogatory No. 40 that was attached to the answers to the interrogatories that were filed?

(Testimony of Thomas Cavanaugh.)

A. Yes, I either prepared them or it was under my supervision.

Q. And after the preparation of that schedule, which I believe extended up to December 31, 1959, did you at my request prepare that schedule, a new schedule on the same thing covering the period from the acquisition of this property by Duke City Lumber Company to March 31, 1960? [963]

(Defendants' Exhibit L marked for identification.)

Q. Mr. Cavanaugh, the clerk has handed you a document which has been marked Defendants' Exhibit L for identification. Tell us what that is?

A. This is the profit or loss per thousand for the Winslow operation from the date of acquisition of Duke City Lumber Company up to March 31, 1960.

Q. Now, let me ask you this, Mr. Cavanaugh, do you keep separate books of Duke City Lumber Company showing as a separate entity the Winslow operation so that you can look at that set of books and determine what the profit or loss might be for a given period of time?

A. Not in its entirety, no.

Q. Are there certain calculations in that exhibit which you have in your hand which are based upon an estimate, with particular reference to Schedule D?

A. The general and administrative expense on Schedule D is partly an estimate in that I estimated the partners' salaries. The other part are actual

(Testimony of Thomas Cavanaugh.)

figures, however they are prorated on a per thousand basis.

Q. How did you arrive, Mr. Cavanaugh, at the estimate of partners' and officers' salaries shown on Schedule D?

A. I came out with a figure of \$100,000—

Mr. Romley: Just a moment, if your Honor please, I object to any testimony with regard to any figures that he [964] came up with in any reference to an exhibit that is not in evidence. This is indirectly a reference to that.

Mr. Moore: If your Honor please, then we offer this exhibit in evidence so we can discuss it. Mr. Romley has asked me, he said he wanted to object unless there was additional foundation and I was trying to lay it.

The Court: May I see the exhibit?

Mr. Romley: Our objection, if your Honor please, is that the exhibit is hearsay. There has been no sufficient compliance or any compliance shown with the voluminous records rule. I appreciate an accountant can testify or prepare and present a summary of matters appearing in records and condense them into an instrument, but it is my understanding of that rule that those records must be available for examination here in the courtroom. We have never seen records, they have never been tendered to us. In fact, when we took Mr. Cavanaugh's deposition and we inquired about some of these things in Albuquerque they refused the opportunity to go into it.

(Testimony of Thomas Cavanaugh.)

The Court: The objection will be sustained.

Q. (By Mr. Moore): Mr. Cavanaugh, what records do you keep—let me back up a moment. Do you have a separate set of records for the Winslow operation alone? A. Entirely in itself?

Q. Yes. A. No. [965]

Q. Tell me about your bookkeeping system for Duke City Lumber Company, describe it, what you have?

A. Well, we have a general ledger which includes all of our assets and liability accounts. It includes also our income accounts which are sales from Winslow and sales from Albuquerque. It includes other income and other expense. It includes our purchased lumber which we buy from different mills in New Mexico that is delivered into Albuquerque. It is broken down into three other groups of the three mills we own ourselves, that is Gallinas in New Mexico, Cuba and Winslow.

Q. Those are all in one group, is that what you mean?

A. Yes. There are supporting documents of course for all of it. These are summary sheets for the general ledger as it is known.

Q. Is it possible, without making some allocations and estimates as you did on Schedule D to look at those books and ascertain the exact figure applicable on those items to the Winslow operation?

A. For Schedule D?

Q. Yes. A. No, sir.

(Testimony of Thomas Cavanaugh.)

Q. And how long have you been working in the lumber industry? A. Eleven years.

Q. As accountant and comptroller did you have any knowledge of what other executives in the, or owners in the lumber business drew in the way of salaries and compensation?

A. I knew what the officers were getting in New Mexico Timber Company.

The Court: Pardon me, Mr. Moore. It is about time for the afternoon recess. [967]

(Recess.)

After Recess:

Q. (By Mr. Moore): Mr. Cavanaugh, with reference to this Exhibit L for identification, are a part of the figures there taken from records that are intermingled with all of the accounting records of Duke City Lumber Company?

A. Yes, sir.

Q. And those parts of it are extracts from those intermingled records, is that correct?

A. Yes, sir.

Q. The part that you told me about that was estimated and allocated, that's the schedule that we heretofore mentioned? A. Yes, Schedule D.

Q. From your knowledge of the operation, does that exhibit show what you would say to be the correct figure with respect to the profits or loss of the Winslow operation from the date of acquisition up to March 31st, 1960?

(Testimony of Thomas Cavanaugh.)

Mr. Romley: We object to that as calling for a conclusion and not the best evidence, no proper foundation has been laid.

Mr. Moore: I'm simply trying to further identify it, your Honor, with that question.

The Court: Well, the objection is that the books are themselves the real evidence, the chart or summary is prepared from them and you are not entitled to offer the chart or to have it received, at least, until counsel has an opportunity to [968] examine the source, the basic evidence which supports the chart.

Mr. Moore: I'm well aware, and I appreciate that is the rule, your Honor, and I so understand. But my thought was this: That where you have one set of books that covers various operations, you are trying to ascertain information with respect to one particular unit of the operation, that this would be the proper way to do it.

The Court: No, you'd still need the books.

Mr. Moore: Furthermore there has been some testimony in the record with respect to things shown in the schedule answering interrogatory number 40, particularly with the overrun, I believe Mr. Smith, I believe that was his name, testified that he had examined the file on our schedule answering interrogatory number 40 and concluded there was a 14.6 percent overrun. Now, without taking up further Court's time I renew the offer.

The Court: The objection is sustained.

(Testimony of Thomas Cavanaugh.)

Mr. Moore: May we then move to strike from the record and from any consideration by the Court the testimony of Mr. Smith with respect to the answers that he—statements that he made which were based upon the schedule attached to answers to interrogatories answering interrogatory number 40?

Mr. Romley: This exhibit that is offered now, your Honor, was not a part of the answer to that interrogatory. [969] He prepared it some time after those interrogatories and brought it in of his own, and not in response to any request or interrogatory we submitted to him.

The Court: Well, the interrogatory stands in an entirely different basis, it's something that was supplied by you and in response to the interrogatory, and there was no objection to Mr. Smith considering it and I doubt if there could have been a valid objection to his considering it since it was finished by you. But this, as I compared it to a moment ago, this is completely different.

Mr. Moore: It covers the period, the extended period up to March 31st. Otherwise it is identical other than it covers the extended period from December 31st, 1959, to March—whatever the date is, 1960.

The Court: Well, then, if we are all fairly much in agreement that the only way that you may show or produce evidence which has its source in the books and records of the company is to either put the books and records in evidence themselves or

(Testimony of Thomas Cavanaugh.)

have them available in the courtroom or close enough that counsel may examine them and be prepared to study the accuracy of the summary. And if you don't do that, there isn't any way that I know that you can get it in. It would be the most severe departure from the rule and it would mean that the transcript or summary would just go in, there wouldn't be any way to test it or to cross examine about it effectively. [970]

The objection is sustained.

And I should make the ruling the motion to strike the testimony of Mr. Smith to the extent indicated is denied.

Q. (By Mr. Moore): Mr. Cavanaugh, are you familiar with the schedule attached to the answers answering interrogatory 17-A, which I believe is Plaintiffs' Exhibit 15 in evidence?

A. That's on U and O insurance?

Q. Apparently you are more familiar with it than I am.

The Court: It was marked for identification 15.

Mr. Romley: I thought that I had another one.

Mr. Moore: Oh, it's loose.

The Court: It's in answers to the interrogatories.

Mr. Romley: Yes, I find my copy now.

Q. (By Mr. Moore): Now, I hand you, Mr. Cavanaugh, Plaintiffs' Exhibit 15 in evidence. Are you familiar with that? A. Yes, sir.

Q. Did you prepare that? A. Yes, sir.

Q. Was that based upon an estimate?

A. Yes, it was.

(Testimony of Thomas Cavanaugh.)

Q. How long had you been working for Duke City when you prepared that?

Mr. Romley: Now, what was that last question?

Q. (By Mr. Moore): How long had you been working for Duke [971] City when you prepared that estimate?

A. About a month and a half.

Q. Did you prepare that exhibit in conjunction with anyone else? A. Yes.

Q. Who was it?

A. John Edsel with U. S. Underwriters, Lumberman's Underwriting Alliance, and I sat down and went through the figures.

Q. At the time you went through these figures had you had an opportunity to go through the books of Duke City to ascertain what their costs were?

Mr. Romley: Now, just a moment, if your Honor pleases, I don't know what the purpose of this examination is but it does appear to me that perhaps counsel is leading toward an attempt to impeach this exhibit, which is his sworn testimony. This is in answer to an interrogatory under oath.

The Court: No, this is——

Mr. Moore: It's not sworn testimony.

The Court: This is apparently, Mr. Romley, a copy of a statement furnished to an insurance company.

Mr. Romley: But I understand that it is a part of the answer to the interrogatories which is under oath.

(Testimony of Thomas Cavanaugh.)

The Court: No, you asked in the interrogatory, "Have you ever furnished a statement to anybody?" and he says, "Yes." [972]

Mr. Romley: And this is it.

The Court: And that's what they did.

Mr. Moore: That's right, that's right.

The Court: Now, he is telling how he prepared it and the sources and so on.

Mr. Moore: What was the question?

(Whereupon, the pending question was read by the reporter.)

A. No, sir.

Q. (By Mr. Moore): Now, after you prepared that with Mr. Edsel, did you have a conference or conversation with Mr. Liberman about the—your estimated net profit?

Mr. Romley: We object to that, if your Honor pleases, as having no probative value and based on hearsay. He says they had the conversation and the next thing, "What was that conversation."

The Court: He may answer yes or no.

A. Yes, sir.

Q. (By Mr. Moore): What directions did you have from Mr. Liberman with respect to reducing or leaving that statement as it was for the purpose of obtaining insurance covering use and occupation?

Mr. Romley: Object to that as calling for hearsay.

The Court: The objection is sustained.

(Testimony of Thomas Cavanaugh.)

Q. (By Mr. Moore): Did you, through the gentleman you [973] mentioned, Mr. Edsel, acquire use and occupation insurance? A. Yes, sir.

Mr. Romley: Object to that.

Q. (By Mr. Moore): Did you insure on the basis of the profit there shown or did you insure on half of that?

Mr. Romley: Object to that as entirely immaterial, if your Honor please, and based on hearsay. The insurance itself would be the best evidence.

Mr. Moore: Do you have the policy with you?

A. Yes, sir, I do.

Mr. Moore: Will you get it, please.

Mr. Romley: It's still hearsay.

The Court: No, he may produce the policy if he has it.

Q. (By Mr. Moore): Mr. Cavanaugh, can you point out to me the endorsement or the page of that policy that covers the use and occupation insurance on the Winslow plant? A. This is the page.

Mr. Romley: May we have a moment here.

Mr. Moore: I think this comes under the voluminous records rule we were talking about, your Honor.

Mr. Romley: May I inquire on voir dire, if your Honor please?

The Court: Surely.

Mr. Romley: Can you tell us when this Exhibit 15 was prepared? [974]

(Testimony of Thomas Cavanaugh.)

A. This Exhibit 17 or whatever——

Mr. Romley: I believe it's 15, is it not?

A. 17-A.

Mr. Romley: Answering interrogatory 17-A was it 15?

A. Oh, excuse me, I'm sorry. May the 7th, 1959.

Mr. Romley: Let me call counsel's attention to the fact that he has an endorsement here to which this is attached dated September 4th, 1959.

A. There is a reason for that.

Mr. Romley: Well, I don't think there is any question before the Court now.

Mr. Moore: If the Court please, rather than encumber the record with all this policy and try to interpret it at this time I want to ask the witness one question.

Mr. Romley: Is it directed to something that is not in evidence? I am going to object if it is.

Mr. Moore: I'm sure you will.

Q. (By Mr. Moore): This document, Plaintiffs' Exhibit 15, was that——

The Court: That is not in evidence. You will remember that Mr. Romley offered it and I said it would be duplication. Then you stipulated that the answer contained or the schedule attached to the answers would be in evidence for all purposes. So that particular document is not in. But in effect it is.

Mr. Moore: The contents of it are in? [975]

The Court: That is right.

(Testimony of Thomas Cavanaugh.)

Q. (By Mr. Moore): Are the figures shown on that exhibit purely an estimate that you and Mr. Edsel made?

Mr. Romley: Object to that as leading and suggestive, if your Honor pleases, and calling for a conclusion.

The Court: He may answer.

A. Yes, they are.

Q. (By Mr. Moore): Without consultation of the books or records of Duke City Lumber Company, is that correct?

Mr. Romley: Now, just a moment, I object to the continual leading, your Honor.

The Court: Objection sustained.

Q. (By Mr. Moore): Had you considered the books and records of Duke City Lumber Company before you made that exhibit, or prepared the information which appears on that exhibit?

A. No, sir.

Q. (By Mr. Moore): Mr. Cavanaugh, this is Plaintiffs' Exhibit 16 and I believe that is in evidence, your Honor?

The Court: I think that's the same situation.

Mr. Moore: Well, the information contained there?

The Court: The information on it is in evidence.

Q. (By Mr. Moore): Let me show you, Mr. Cavanaugh, the schedule answering interrogatory 33 and 34. Does that correctly set forth the footages of timber on those various units as of the dates shown? [976]

A. Yes, it does.

(Testimony of Thomas Cavanaugh.)

Q. Now, did you calculate and determine the amount of that timber that had been cut up to March 1st, 1960? A. Yes, sir.

Mr. Moore: May we have that sheet.

Mr. Romley: What was that for identification, 16?

The Court: 16.

(Defendants' Exhibit M marked for identification.)

Q. (By Mr. Moore): Mr. Cavanaugh, I hand you Defendants' Exhibit M for identification and ask you to tell me what that is?

A. This is a schedule that starts out with the timber that Arizona Timber Company put into the pooling agreement of July 30th, 1957. Then it adds subsequent purchases and some minor adjustments where the footages ended up a little bit differently because of the overrun factor. Then it deducts also the amount of timber cut under the milling agreement and comes down to the net figure of timber sold to Duke City on November 6th, which is the same as this other schedule we just looked at. Then it shows the timber cut by Duke City Lumber Company from December the 1st, 1958, through March 1st or April 1st of 1959. Then the last column is balance available, left.

Mr. Moore: We offer in evidence Defendants' Exhibit M.

Mr. Romley: May I inquire on voir dire, if your Honor [977] pleases, so I may understand this exhibit?

(Testimony of Thomas Cavanaugh.)

The Court: Yes.

Mr. Romley: When was this exhibit prepared, M, Mr. Cavanaugh?

A. I don't know, Mr. Romley.

Mr. Romley: Did you prepare it?

A. I got all the figures together but I don't recognize that schedule as being prepared by myself.

Mr. Romley: We object, no proper foundation has been laid.

Q. (By Mr. Moore): What records do you have, Mr. Cavanaugh, that you can check these figures against, or exhibit to Mr. Romley so he can check them?

A. I have another schedule similar to that I gave to Mr. Pfister there at lunch time. I have another copy, Mr. Moore.

Mr. Moore: Would you get it, please. We will pass that and let Mr. Romley check this one we have, if the Court please.

Mr. Romley: I don't want to appear technical, your Honor, but I don't understand what it's all about and perhaps I can check it over tonight.

Mr. Moore: We can explain it to you and show you whatever records we have that it's based on.

Q. (By Mr. Moore): Mr. Cavanaugh, are you familiar with the settlement that was made by Duke City with Arizona Timber [978] with respect to the timber that had been cut under the pooling agreement?

A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. And did you—do you have any information as to whether that timber that was cut showed an overrun or an underrun? A. Yes, sir.

Mr. Romley: Just a moment—may I inquire on voir dire, if your Honor please?

The Court: Very well.

Mr. Romley: Mr. Cavanaugh, is that information based on or ascertainable only from examination of records?

A. It's on this one schedule, Mr. Romley, that we submitted the other day, 19, or whatever—the one that made the breakdown of the pine and fir.

Mr. Romley: Is that information obtainable entirely from 19 or do you have to have reference to other records?

A. No, it's all on that one schedule.

Mr. Moore: That's Plaintiffs' Exhibit—

Mr. Romley: That's 19 for identification, I don't believe it's in evidence, as I recall it, is that correct?

Mr. Moore: May I see that, please?

Mr. Romley: I think I still have you on voir dire, sir. I'm sorry, I overlooked that.

Is the data which appears on this exhibit available [979] anywhere else in the courtroom other than on that exhibit?

A. On this exhibit he has?

Mr. Romley: 19, if that is its number.

A. I'm not sure whether I have some of those timber cutting contracts with me or not.

(Testimony of Thomas Cavanaugh.)

Mr. Romley: Your Honor, I think perhaps I'd better not proceed with voir dire. Let counsel proceed and I can perhaps reach it in another way; but I don't recall anything on the exhibit that discloses how you determine an underrun or an overrun or anything else.

Q. (By Mr. Moore): From this exhibit, can you calculate whether there was an overrun or an under-run? A. Yes, sir.

Q. And have you done that?

A. Yes, sir. On——

Q. No, not what it is. Now, do you have anything else in your records here with you other than this particular copy that shows this information?

A. Not prepared from this.

Q. Well, from which this was prepared?

A. No, sir, not all the details.

Q. What is this document that you have in your hands?

A. This is the final settlement sheet that I made up when I was with Arizona Timber Company and we came to the final end of the pooling agreement. We had to determine how [980] much—as you know the pooling agreement started out 50-50, but Duke City received more lumber than Arizona Timber, so we had to——

Q. Figure out how much was due?

A. ——determine how much their pro rata share of the stumpage was so we had to work the lumber received.

(Testimony of Thomas Cavanaugh.)

Q. And is this a true and correct copy of the work sheet that you made that report from?

A. Yes, sir.

Q. And was that report the basis upon which the payment of \$317,000 which Mr. Liberman has testified to was made in the form of notes to Arizona Timber Company?

A. Made with a letter agreement between the two parties.

Q. With a letter accompanying it?

A. No notes, just a letter agreement.

Q. And from that exhibit you told me, I believe, you can calculate whether there was in fact an underrun or an overrun on that timber cut with respect to the lumber realized? A. Yes, sir.

Mr. Moore: Then we offer in evidence Plaintiffs' Exhibit 19.

Mr. Romley: Just so that the record may be complete, and I'm not being technical, do you have the letter that he says was a part of this? This was transmitted with it.

Mr. Moore: I will show you the letter. [981]

Mr. Romley: That shows a breakdown, does it not, of these various items?

Mr. Moore: No.

The Witness: Yes, sir.

Mr. Romley: Yes, it does. Now, I have no objection if they let us have the letter as a part of that exhibit, because it is explanatory of the exhibit.

Mr. Moore: Let's have the letter. I think you have a copy of the letter, haven't you, Mr. Romley?

(Testimony of Thomas Cavanaugh.)

Mr. Romley: Yes, I have a copy of it but I am speaking of having it in evidence, put your original in there.

Mr. Moore: Maybe I don't have the original.

Mr. Romley: This letter was addressed to Mr. Liberman.

Mr. Moore: May we attach the copy of the letter which Mr. Romley was just talking about to Plaintiffs' Exhibit 19 and make it one exhibit and make it our exhibit, then I will offer it.

The Court: Any objection?

Mr. Romley: No, your Honor.

The Court: It may be received as Defendants' N.

Q. (By Mr. Moore): From your calculations from that exhibit, Mr. Cavanaugh, was there an overrun or an underrun?

A. There was an underrun.

Q. Of how much?

A. About nine-tenths of one percent. [982]

Q. Mr. Cavanaugh, there has been discussion here with respect to the condition of the mill at Winslow when it was taken over by Duke City Lumber Company. Do you have any recollection of taking a memorandum from Mr. Gallagher to someone at the Winslow mill with reference to the maintenance and operation of that mill during the latter part of '58? [983]

A. Yes, sir.

Q. Do you have a copy of the memorandum?

A. No, sir.

(Testimony of Thomas Cavanaugh.)

Q. You delivered it to whom?

A. To T. W. Steward, the sawmill foreman.

Q. You don't have available a copy of the memorandum any place? A. No, sir.

Q. Did you read the memorandum?

A. Yes, sir.

Q. What is your recollection as to the instructions which Mr. Gallagher gave?

Mr. Romley: We object to that.

Q. (By Mr. Moore): Wait until I finish. —to the foreman or manager of that mill with regard to maintenance of the mill and spending money on it during the latter part of 1958?

Mr. Romley: We object to that, if your Honor please, on the grounds it is based on hearsay.

Mr. Moore: It is not hearsay.

The Court: He may answer.

A. Mr. Gallagher—

Mr. Romley: Your Honor, may I make a further objection that the question itself is too indefinite. He said during the latter part of 1958. [984]

Q. (By Mr. Moore): Very well. Approximately when was that, Mr. Cavanaugh, as near as you can recall?

A. The very early part of November, 1958.

Q. What was the substance of the memorandum or instructions from Mr. Gallagher to the foreman at Winslow?

A. Mr. Gallagher handed me this memorandum and asked me to take it over and talk to Mr. Steward, who was foreman of the sawmill, and the sub-

(Testimony of Thomas Cavanaugh.)

stance of the memorandum was not to spend any money at all for any unnecessary items, such as bandsaws or anything else they could get along without, until of course it was turned over to Duke City Lumber. He said in the memorandum he would give the fellows a bonus—I don't know how many fellows there were, but to Mr. Steward he would give a bonus if he could keep all expenses to a minimum from that date until the time the sawmill was turned over to Duke City.

Q. Do you know when the mill was turned over to Duke City? A. December 15th.

Q. Was the mill turned over at that time, or was that March?

A. No, the sawmill was turned over December 15th but the planing mill in March.

Q. I get the two confused. The sawmill was December 15th but the planing mill in March? [985]

A. Yes, sir.

Q. Mr. Cavanaugh, were you familiar with the operation of Arizona Timber Company in connection with the milling contract that they had with Duke City? A. Yes, sir.

Q. Is it a fact that in that operation Arizona Timber Company carried the inventory?

A. Yes, sir.

Q. Do you have any recollection as to what the average inventory was that was carried by Arizona Timber for Duke City under that agreement?

(Testimony of Thomas Cavanaugh.)

Mr. Romley: We object to that as immaterial, your Honor.

The Court: I don't see any materiality of it, Mr. Moore.

Mr. Moore: The materiality of it, your Honor, is that under the plaintiffs' theory in this case the inventory, that contract was going to be continued or an identical deal worked out. And this is foundation for some additional evidence that we will have in the way of an analysis and computation of the plaintiffs' exhibits where they are relying upon that contract in order to claim loss of profits. If counsel will stipulate as to the figure of what that inventory was that is it. That is the materiality of it, a foundation for additional evidence to analyze some of the exhibits now in evidence, your [986] Honor.

The Court: He may answer.

A. The inventory of December 15th of about four and a half million feet in my estimate would be that month in and month out the inventory was probably between four and four and a half million feet.

Q. (By Mr. Moore): Convert that to dollars, that is what I am talking about.

A. Which would be an average of, say, \$40 per thousand, 160 to \$175,000.

Mr. Romley: Average how much, sir?

The Witness: \$40.

Mr. Moore: You may examine.

(Testimony of Thomas Cavanaugh.)

Cross Examination

Q. (By Mr. Romley): This inventory you speak of, Mr. Cavanaugh, was the average of the inventory after the pooling agreement was, or was it the milling agreement that was entered into, sir?

A. After the milling agreement was entered into, yes.

Q. That would be after August 9, 1958?

A. 1957.

Q '57, you are right, sir. What was the average inventory before we had that pooling agreement, Arizona Timber Company had, substantially the same? [987] A. No.

Mr. Moore: I object, your Honor, because the inventory, the witness testified was the inventory of Duke City that Arizona Timber had to carry under that agreement. It did not relate to the Arizona Timber Company's own inventory.

Mr. Romley: Then I misunderstood the testimony if that is the situation.

You say this average inventory of four to four and a half million, that was inventory of Duke City's that the Arizona Timber Company carried?

A. Yes, sir.

Q. What do you mean by carried?

A. We did not receive payment for it until it was shipped and invoiced. In other words, Arizona Timber financed the inventories.

(Testimony of Thomas Cavanaugh.)

Q. Was that a matter of contract or just courtesy? Was that provided for in the pooling agreement or milling agreement?

A. It is in that milling agreement.

Q. Are you referring to Exhibit 5?

A. Yes, sir.

Q. Could you put your finger right on that one item, please? A. The second paragraph.

Q. You are referring to supplement No. 3? [988]

A. Yes.

Q. Payments for overhead shall be made——

A. No, "Payments for Lumber Shipped will be expected within ten days after date of invoice."

Q. An invoice was submitted monthly, is that the situation?

A. No, sir. Every carload of lumber that went out we sent an invoice.

Q. Now, did Mr. Gallagher talk with you in August, 1957 when this pooling agreement was, or this milling agreement was entered into with regard to the charges that should be made for the timber that was to be milled for Mr. Liberman?

A. I don't understand what you mean, Mr. Romley, what you mean by charges for timber. There was no charge.

Q. The milling agreement is this Exhibit 5 I just handed you, is it not? A. Yes, sir.

Q. Under that milling agreement the Arizona Timber Company was to mill for Duke City the Duke City's timber, is that right? A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. And Duke City was to pay certain fixed charges and costs in connection with that transaction? A. Yes, sir.

Q. Now, before that agreement was made was the subject [989] of the agreement discussed with you by Mr. Gallagher? A. Yes, sir.

Mr. Moore: Getting into the field of hearsay, your Honor. I think it is time for me to object to hearsay.

The Court: So far he has only asked about the fact.

Q. (By Mr. Romley): Do you know who carried out the negotiations with Mr. Liberman regarding that milling agreement?

A. This time I think Mr. Gallagher himself did; the year before I did with Mr. Dorais and nothing came of that.

Q. Who was Mr. Dorais?

A. He was comptroller at Duke City at that time. And nothing came of the first.

Q. That would be in '56? A. Yes, sir.

Q. And you had no part in any of the negotiations with Mr. Liberman in '57, is that correct?

A. No, sir, I couldn't say that. I am sure I set in on some of their meetings because Gallagher relied on me for the figures.

Q. Were those figures finally arrived at, figures that you discussed with Mr. Gallagher?

A. Mr. Gallagher and Mr. Liberman, yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. Did you at arriving at those figures seek to determine what would be a fair charge for the item of depreciation? [990] A. Yes, sir.

Q. And that was, as shown in the agreement here, \$4.33 a thousand, was it not?

A. Yes, sir.

Q. The agreement entered into on November 6th, 1958, that is the final signed document in connection with the October 16 agreement made in New York provided for a reduction of the item of depreciation from \$4.33 a thousand to \$3.50, isn't that right, sir?

Mr. Moore: Talking about a document that would speak for itself.

Mr. Romley: It is preliminary to——

A. I would have to refresh my mind on that, but if it was, Mr. Romley, it was because a certain part of the lumber had gone through a certain part of the stages. We took off depreciation, maybe 83 cents for the woods part of it and the rough lumber had so much more depreciation and the planing mill depreciation and what not onto that.

Q. In your opinion was the charge of \$4.33 for depreciation under the milling agreement which Mr. Liberman agreed to pay in connection with the milling of his timber adequate compensation for that item of depreciation?

Mr. Moore: We object to that, if your Honor please, wholly irrelevant and immaterial.

The Court: He may answer. [991]

(Testimony of Thomas Cavanaugh.)

Mr. Moore: It doesn't tend to prove or disprove any issue in the case.

A. It was actually a little low because I prepared a schedule showing depreciation of \$150,000 a year and through negotiation it was brought down a little bit, to \$130,000. So Mr. Gallagher stood more than 4.33 himself.

Q. (By Mr. Romley): Do you know how much depreciation you took into account when you prepared the exhibit, which is in answer to one of the interrogatories here reflecting the costs through December 31, 1959, do you remember that, sir?

A. Yes, I remember.

Mr. Moore: That is the exhibit you objected to.

Mr. Romley: No, it is not, sir. The one I objected to was the one you prepared afterwards.

You had an item of depreciation there of \$9 and I think 68 cents, isn't that correct?

A. No, sir, it couldn't come out that high.

Q. Let's take a look at that, please.

Do you remember which one of these exhibits showed the various items of depreciation?

A. Yes.

Q. Will you look at it please.

Mr. Moore: There was a corrected one substituted you recall on that. Is that the one you are giving him?

The Witness: It doesn't change the depreciation figure. [992]

Mr. Romley: The depreciation figures are not changed. All right.

(Testimony of Thomas Cavanaugh.)

A. Each account, like log hauling——

Q. (By Mr. Romley): Let's tell the Court first what you are referring to. You are referring to the second page of Schedule B, which is a schedule answering interrogatory No. 40, is that right?

A. Correct.

Q. Now——

Mr. Moore: Excuse me, Mr. Romley, you said Schedule what?

Mr. Romley: Schedule B, the second page.

Mr. Moore: B?

Mr. Romley: B, as in boy.

Mr. Moore: Thank you.

Q. (By Mr. Romley): Now, the items there relating to depreciation are on this schedule and this schedule alone, is that right, sir?

A. On the three or four pages, yes.

Q. Now, let's check these, please, as we go along and read them into the record. The first one appears under log hauling, does it not, on page 1, headed Duke City Lumber Company Production Cost, Winslow, December 1 of '58 to December 31 of '59? [993]

A. Yes, sir.

Q. Log hauling depreciation, you have \$2.62 per thousand for that item, is that right?

A. That's right.

Q. The next item of depreciation appears on the next page under sawmill, is that right, sir?

A. Yes, sir.

Q. That is \$1.44 a thousand?

A. Right.

(Testimony of Thomas Cavanaugh.)

Q. The next item on depreciation is under stacking, 44 cents, is that right?

Mr. Moore: Under what?

A. Yes.

Mr. Romley: 44 cents, under stacking.

The next item is depreciation, is your drying yard, 40 cents per thousand, right?

A. Yes.

Q. And the next under dry kiln, \$1.77, is that right, sir? A. That is right.

Q. The next under planing mill, \$1.19, is that right? A. Yes, sir.

Q. The next under surface yard shipping, 17 cents? A. Right.

Q. The next under service department, \$1.09, is that right, sir? [994] A. That is right.

Q. Next under general and administrative plant, 14 cents? A. Right.

Q. Does that finish the depreciation items?

A. That is it, Mr. Romley.

Mr. Romley: What does that total, Phil? \$9.36, if our computation is correct—9.26. In any event, over \$9, is that right?

A. If I can say something now.

Q. Is that correct, sir?

Mr. Moore: We insist the witness have an opportunity to explain his answer.

The Court: Go ahead and say what you want to say.

(Testimony of Thomas Cavanaugh.)

A. You can't take the depreciation of the dry kiln, say we only run 40 percent of the lumber through it, we take the per thousand figure, which might be \$1.15 and add that up into these averages. It has to be weighted because only 50 per cent of 30 per cent of our lumber goes through the dry kiln, of the end product you sell, only 40 per cent of that depreciation item should check out in the total depreciation.

Q. You are speaking of the dry kiln?

A. Yes, sir.

Q. \$1.77?

A. Yes, seven million feet compared to 29 million feet, [995] which is only a fourth, in that range.

Q. Then the production by Duke City during these 13 months, that is what you have covered under this schedule, is that right? A. Yes, sir.

Q. It was substantially the same as during the preceding 13 months by the Arizona Timber Company, isn't that right, sir?

A. I don't know, Mr. Romley, without referring to some figures. It seems to me that Duke City produced more.

Q. Duke City produced more?

A. A little more.

Q. Yet ran less through the dry kiln, is that right, sir.

A. No. Arizona Timber may have run the same amount through the dry kiln.

(Testimony of Thomas Cavanaugh.)

Q. If they ran the same amount how do we have a discrepancy from \$4.33 to \$9 and some cents?

Mr. Moore: We object to the question, if your Honor please, because the witness has not said that Arizona Timber's depreciation was \$4.33. The only figure he used was with respect to the milling contract and the witness has said the depreciation was in fact higher than that.

The Court: The objection is sustained.

Q. Now, when you were preparing a figure for depreciation [996] upon which Mr. Gallagher and Mr. Liberman finally reached an agreement, were you guessing at depreciation or did you take it from the records of Arizona Timber Company?

A. I took it from the records, but there were some fully depreciated items in those records which is not the case with Duke City figures now.

Q. On depreciation figures during the Duke City Lumber operation on substantially the same equipment and machinery and buildings as was figured, as existed under the Arizona Timber Company operation?

A. Substantially the same, except for the few additions Mr. Weinstein talked about.

Q. They would not affect the picture more than a few cents per thousand, is that right?

A. Mr. Romley, we are talking about a big difference in price, starting price to depreciating.

Q. Did you set up the depreciation schedule on the equipment purchased by Duke City from the Arizona Timber Company?

A. No, sir.

(Testimony of Thomas Cavanaugh.)

Q. Do you know who did? A. Yes, sir.

Q. Who? A. Mr. Buss, my predecessor.

Q. He was comptroller ahead of you for Duke City? [997] A. Yes, sir.

The Court: At this time we will recess until tomorrow morning. As I told you earlier, gentlemen, we will be qualifying a jury and impaneling a jury tomorrow. I guess the best estimate is it might be 10:15 before we get started on this.

(Whereupon a recess was taken at 4:30 o'clock p.m. on May 11th, 1960, until 10:15 o'clock May 12, 1960.) [998]

May 12, 1960, 10:15 O'Clock A.M.

THOMAS CAVANAUGH

resumed the witness stand and testified further as follows:

Mr. Moore: If the Court please, during the recess, and with Mr. Cavanaugh yesterday we were discussing Exhibit M; in lieu of offering that exhibit, we have stipulated as follows:

That from the time Duke City took over the timber from Arizona Timber Company up to March 1, 1959, they had cut 9,696,250 feet net log scale. We do not have records to exactly allocate it by the month, but we have stipulated that of that figure 4,000,000 was cut in December; 4,696,250 feet cut in January, and 1,000,000 cut in February.

(Testimony of Thomas Cavanaugh.)

Does that correctly state our stipulation?

Mr. Romley: That is a correct statement.

The Court: The record may show the stipulation.

Cross Examination—(Continued)

Q. (By Mr. Romley): Mr. Cavanaugh, yesterday during the course of the direct examination Mr. Moore asked you this question—I am reading from 976: [999]

“Have you considered the books and records of Duke City Lumber Company before you made that exhibit or prepared the information which appears on that exhibit?” And you answered: “No, sir, I didn’t.”

I just state this now to bring the matter back to the starting point for today’s proceedings. Do you recall that, sir? A. Yes, sir.

Q. Do you remember that exhibit to which you referred was the one designated as the Schedule answering interrogatory No. 17-A, the Winslow U and O Statement? A. Yes, sir.

Q. Do you have a copy of that statement before you? A. Yes, I do.

Q. I want to ask you a few questions regarding that, please, sir. I believe you testified yesterday it was made by you and Mr. Edsel on May 7, 1959, is that right?

A. Yes, sir. It was really made by myself with consultation with Mr. Edsel.

Q. Who is Mr. Edsel?

(Testimony of Thomas Cavanaugh.)

A. Edsel is representative of U. S. Epperson Underwriting Alliance.

Q. The insurance company?

A. Insurance company.

Q. I think Mr. Moore brought from you the fact that you [1000] at that time had been employed by Duke City for only a month and a half or seven weeks, or thereabouts?

A. That is right.

Q. When you said you did not consider the Duke City books in making up this statement, you mean you did not consider the records at all, or considered them in part?

A. No, sir, I didn't. My basis of the information was what I had known before about the operation from Arizona Timber Company. We had not set up the books at that time in such a way I could pull out the cost of Arizona operation under Duke City.

Q. If I understand you correctly, this schedule answering 17-A was not based in any degree on the Duke City books and records?

A. No, sir, not at that time.

Q. But it was based on the books and records of the Arizona Timber Company affecting the Winslow operation?

Mr. Moore: We object to that, if the Court please, as a misstatement of the evidence. He said it was based on his recollection or some reference to that, not the books themselves.

(Testimony of Thomas Cavanaugh.)

The Court: If the statement is not accurate the witness may say so.

A. No, it is not accurate.

Q. Tell me exactly what the situation is? [1001]

A. Mr. Romley, it was one of those things when I first went to work there they kept pressing me to get out figures. We needed to work up U and O costs on all of our different policies in Albuquerque. So one day Edsel came in and I sat down and the best I could recall I wrote up figures of so much for the woods and so much for the sawmill. But I didn't go back to any cost statements or anything else to get the figures, just my memory.

Q. You did not refer to any of the Arizona Timber records? A. No, sir.

Q. When you prepared this schedule, did you believe, sir, that the figures that you set out there correctly reflected the information contained therein on the basis of the Arizona Timber Company operation prior thereto?

A. At that time I did, yes.

Q. Yes. And have you checked your exhibit or schedule against the Arizona Timber records since this was prepared? A. No, I have not.

Q. So far as you know then, this schedule, and I believe it is 15 for identification, still is correct according to the best of your recollection, so far as the Arizona Timber operation is concerned?

A. No, I checked it against our answer to Schedule No. 40 and I found out I made some [1002] errors.

(Testimony of Thomas Cavanaugh.)

Q. Is your answer to Schedule 40 based on Duke City or Arizona Timber? A. Duke City.

Q. My question now, sir—maybe I didn't state it correctly—is this. So far as you know now and to the best of your recollection this schedule answering Interrogatory No. 17-A correctly and accurately reflects the items appearing thereon with regard to the operation by Arizona Timber Company of the Winslow mill, is that right?

A. No, I think all the direct costs up to \$50 are all right and the stumpage figure is all right, but G & A and the selling, I'm sure is too low.

Q. Let me see, sir. All of the direct costs on the schedule up to the point of \$50 are correct?

A. If you compare them with Arizona Timber's figures.

Q. And is the stumpage correct or not?

A. The stumpage figure that I used is not the Arizona Timber stumpage figure, it was an estimate of what I thought Duke City would be averaging.

Q. Actually the stumpage figure is lower than \$16, is it not?

A. Yes, sir, turned out that way.

Q. Isn't it \$13.01?

A. After accounting for the overrun, yes.

Q. So we would then, to make this correct, change on [1003] Exhibit 15 for identification, the stumpage figure from \$16 to \$13.01. Now, you say that the G & A and selling you believe also was not correct? A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. You mean so far as Duke City is concerned or so far as Arizona Timber was concerned?

A. So far as both of them.

Q. At the time it was your recollection that \$5.10 per thousand would cover that item of G & A and selling?

A. I think at the time—I don't know just where I did come up now with the \$5.10, whether I compared it to some previous costs of Arizona Timber—I couldn't have though, because I feel sure now that the \$5.10 is low.

Q. Well—— A. I made a poor guess.

Q. Let's take your opinion now, sir.

Mr. Moore: If the Court please, I object to this line of questioning as irrelevant and immaterial. He is getting into detail on an estimate this man made without reference to books or records, for the purpose of considering the amount of insurance they should carry. It has nothing to do with any issue in this case.

The Court: It is cross examination. He may answer.

Q. (By Mr. Romley): Can you tell us, sir, what in your opinion the G & A and selling expense should be per thousand [1004] insofar as Arizona Timber operation was concerned, instead of your figure of \$5.10?

Mr. Moore: I think in this question, your Honor, the books and records would be the best evidence of what the figures would be and we don't have those books and records.

(Testimony of Thomas Cavanaugh.)

The Court: If the witness must rely on the books and records to answer that, the objection will be sustained. [1005]

Q. Mr. Cavanaugh, you have told us that in your opinion you are using the figure \$5.10 per thousand for G & A and selling, as representing the cost of that item to Arizona Timber Company, you say is too low? A. Yes, sir.

Q. You believe now to be too low?

A. Yes, sir.

Q. How much too low in your opinion is it?

Mr. Moore: We object, if your Honor please, until foundation is laid as to whether or not he has to refer to the books and records to determine that.

The Court: I'm going to let him state it as his opinion. In other words, the witness has come in here and said, "This document that was furnished the insurance company, I prepared that but I didn't give it any consideration, didn't check the books and records and so on, and it's just an estimate. I know now it's wrong."

Counsel is entitled to cross examine him about it and determine what it is based on and in what respects he thinks it is wrong.

Q. (By Mr. Romley): Now, sir, will you tell me how much too low you think that item is?

A. I think probably both G & A and selling are at least \$4 too low.

(Testimony of Thomas Cavanaugh.)

Q. So is it your opinion now, sir, that the G & A and [1006] selling expense of the Winslow operation of the Arizona Timber Company was \$9.10 instead of \$5.10? A. That would be closer.

Mr. Moore: May the record show our continuing objection to this line of interrogation?

The Court: Yes. You said, Mr. Cavanaugh, G and A and selling are both. Do you mean by that total of \$4?

The Witness: Yes, sir.

Q. (By Mr. Romley): Now, are there any other respects in which, on the basis of this exhibit, Schedule answering 17-A, you believe this to be incorrect?

A. There is another item of general and administrative over at Winslow, it's that, when I put this figure of G and A and selling in here, I was thinking of the main office. There is another item of general and administrative expense, I know, that we have now and I know that Arizona Timber Company had before which would perhaps be another two dollars and a half.

Q. Anything else?

A. Well, in this calculation I didn't compute any interest on invested capital.

Q. You don't, in determining operating profit, take interest on operating capital in account, do you?

Mr. Moore: We object to that, if your Honor please, argumentative with the witness. And it's a

(Testimony of Thomas Cavanaugh.)

test of what he is trying to measure net profit by is not determined. [1007]

The Court: It's his estimate, he may answer if he thinks that he should have.

Q. (By Mr. Romley): In preparing a—well, I can have the question. Will you read the question, please.

(Whereupon, the pending question was read by the reporter.)

A. If you have a company that has four or five divisions and you are paying interest to the bank you don't usually allocate interest to each division, but you surely have to figure it as cost of the operation.

Q. It's not a part of operating costs strictly speaking, is it? A. Not strictly speaking, no.

Q. You never showed it ever until you went with Duke City as an operating cost, did you?

A. I could best answer that, Mr. Romley, in that Arizona Timber had a million and a half in cash, Arizona and New Mexico timber. They borrowed no money to speak of.

Q. Will you answer my question?

The Witness: Would you repeat the question?

(Whereupon, the pending question was read by the reporter.)

A. I'm not sure I understand—what are you referring to?

(Testimony of Thomas Cavanaugh.)

Q. (By Mr. Romley): Well, let me rephrase it, sir, if you don't understand my question. When was the first time in [1008] your practice as a certified public accountant or in your experience as a comptroller for lumber companies, the Arizona Timber Company, Duke City, et cetera, when was the first time in that experience that you ever showed interest on operating capital as a cost of operation?

A. I did, even yet I don't show interest on operating capital as a cost of operation. On our statements of Duke City now we show it as other expense also. But if you are making other calculations similar to the ones that you requested, then I think you have to consider it.

Q. Well, in your opinion, sir, the amount paid for interest is not a cost of production strictly speaking, that's true, isn't it?

A. That's right, it's not a production cost.

Q. You have, in preparing these schedules that are attached as answers to the interrogatories, deviated from that procedure and have shown interest as a cost of production, haven't you?

A. Well, on this schedule, Mr. Romley—

Q. Now, will you please answer the question?

Mr. Moore: Well, I submit, if the Court please, that he should direct the witness to which schedule he is talking about.

The Court: Yes, the witness should be advised which schedule you mean, Mr. Romley.

(Testimony of Thomas Cavanaugh.)

Mr. Romley: Yes, your Honor. [1009]

Q. (By Mr. Romley): On schedule answering interrogatory number 40, do you have that before you, sir? A. Yes, sir.

Q. All right. There you show profit per M, Winslow operation from acquisition, December 31st, 1959, is that right? A. Yes, sir.

Q. You show production cost and list other items and conclude with interest on—taken from schedule F, is that right, sir? A. Yes, sir.

Q. That's \$4.01 per thousand? A. Yes, sir.

Q. Now, let's go to schedule F. Do you have that? A. Yes, sir.

Q. Directing your attention first to the second item on schedule F, it is entitled, "Interest paid on timber contract to New Mexico timber, \$19,378.22," is that right? A. That's correct.

Q. Now, is that interest on the timber contract referred to or which comprises the first page of the schedule answering interrogatory number 6?

A. I don't have that schedule, but if it's the one that starts out with \$405,000 at the top, it is.

Q. Yes. [1010] A. That's the one.

Q. Now, the interest then was calculated on an item which included \$317,000 which represented the obligation for the timber that Duke City owed Gallagher for, isn't that right, sir?

Mr. Moore: We object to that as calling for a conclusion, an obligation for timber or obligation for the timber which Duke City owed Gallagher

(Testimony of Thomas Cavanaugh.)

under the evidence that was reduced to a debt and was settled in that final settlement, when it was consummated.

The Court: He may answer.

A. Please repeat the question.

(Whereupon, the pending question was read by the reporter.)

A. It was.

Q. (By Mr. Romley): In connection with prior operations? A. Yes, sir.

Q. Now, let's look at the second item on schedule F, or the first one rather. We were just talking about the second. It reads as follows: "Interest on \$650,000 purchase price at 6 percent, 13 months, \$42,250." You have that before you, do you?

A. Yes, sir.

Q. Now, whereas the second item says, "Interest paid," the first item is captioned only "Interest on," is that right, sir? [1011] A. Yes, sir.

Q. You are not saying that this \$42,500 was paid as interest on the \$650,000 during that period December 1st, '58, to December 31st, '59, are you?

A. No, that's not—I can tell you how I calculated it.

Q. What you did was took the interest at 6 percent on the total of \$650,000 for a period of 13 months? A. Yes, sir.

Q. That's what you did?

A. Figuring on improvements that would be made and what not, I thought that the six hundred fifty, of course, had a declining balance but I knew

(Testimony of Thomas Cavanaugh.)

that we were going to be making improvements, that we would be borrowing money so I just, in this instance, to the best of my ability in the time that I had, I just used the six hundred fifty straight across.

Q. Well, you now recognize it to be incorrect, do you not? A. No, sir.

Mr. Moore: We object to that as argumentative.

The Court: No, his answer may stand.

A. No, sir, I do not.

Q. (By Mr. Romley): All right. You say that there was a declining balance. Now, as of the end of December 31st, 1959, the balance on the six hundred fifty had been reduced to \$247,000 in round figures, is that right, sir? Will you look [1012] at the schedule answering interrogatory number 6? Do you have that? A. No, sir.

Q. I thought Mr. Moore handed you all of them, I asked him to.

Mr. Moore: Apparently he got some of mine, Mr. Romley.

A. That's correct.

Mr. Moore: I thought I gave him all of them.

Q. (By Mr. Romley): As shown by that schedule answering interrogatory number 6?

A. (No answer.)

Q. Well, I think that's in evidence already, or its contents are in evidence so it's probably argumentative to ask with regard to that. Now, the

(Testimony of Thomas Cavanaugh.)

third item appearing on schedule F is "Interest on \$500,000 of working capital used for inventories, receivables, prepaid items, deposits, et cetera, at 6 percent, 13 months, \$32,500." A. Correct.

Q. That's correct, is it not? Again you do not say "Interest paid on that sum," do you?

A. No, sir.

Q. There was no item of interest on that sum on Duke City's books, was there?

A. Yes, sir. [1013]

We were paying interest to the bank at that time.

Q. On \$500,000?

A. No, not on that exact figure, whatever we happened to be borrowing.

Q. For all of Duke City's operations, not for the Winslow operation?

A. Out of the general fund, yes.

Q. Do you know how much the total outstanding indebtedness was when this—as of December 31st, 1959, to the bank on which Duke City was paying interest?

A. I think Duke City owed \$200,000 on our commitment that we had and Mr. Liberman owed about \$160,000 personally which applied against the commitment.

Q. You mean you calculated interest on what he owed personally as distinguished from Duke City? A. No, sir, I did not.

Mr. Moore: We object to that, it's a misstatement.

(Testimony of Thomas Cavanaugh.)

Q. (By Mr. Romley): Do you know how much interest was paid by Duke City during this 13 months period which you reflect here as based on \$500,000 and amounting to \$32,500? Did it amount to 32,500? A. No, sir.

Q. Was it very substantially less than that or do you know?

A. I wouldn't know without looking at our records. [1014]

Q. Do you have any approximate idea of how much it was?

A. Not without just taking a plain guess.

Q. Well, a guess wouldn't help us so we will skip that, sir. Now, then, if we can go back, sir, to this U and O statement that you prepared that was answering schedule 17-A, when you set up the—or showed there the sales average of \$88.50 less 2 percent, or a net of \$86.73, is it correct to say that that was not entirely from memory, but that you did refer to some records so that you could come up with that amount?

A. Yes, sir, in that case I would have to refer to something, because year to year, of course, sales differ.

Q. Sure. You did have some records, then, to which you referred when you prepared this U and O statement?

A. As far as sales average, yes.

Q. Now,—

A. Also as far as continuing expenses.

(Testimony of Thomas Cavanaugh.)

Q. When you speak of continuing expenses tell me what you mean, sir?

A. Under the U and O policy, Mr. Romley, they insure the loss of any profits that you may have. They also insure any continuing expenses that may go on during the time of your fire loss, for instance salaries, and I know that I do have interest in that part. I didn't show it as a production cost, but I did show it as a continuing expense. And watchmen, [1015] anything else that—any expenses that would continue they reimburse you for your profit that you lose plus those continuing expenses.

Q. Are these the ones that are shown by month at the lower righthand corner of this schedule where you use May 18th, seven fifty, and so on down?

A. No, sir.

Q. I didn't know what those figures were.

A. I can explain it if you wish.

Q. Well, I will get to that a little later in proper order if I don't forget it, sir.

Then you had before you when you prepared this some records of the Arizona Timber Company that showed the sales average for the years ending, I assume, in 1958, is that right?

A. No, sir, I did not.

Q. Ending when?

A. It was not the records of Arizona Timber, it was the records of Duke City Lumber as far as the sales figures.

(Testimony of Thomas Cavanaugh.)

Q. As far as the sales average is concerned?

A. Yes, sir, if I prepared this on May the 7th, which I did, I probably took the sales average.

Q. Of Duke City?

A. Of Duke City, say for the month of April.

Q. I see. To that extent then your answer yesterday was [1016] wrong when you said you did not consider the books and records of Duke City?

A. That would be right.

Q. You just overlooked that? A. Yes.

Q. Now, as a matter of fact that figure of \$86.73 comes very close to the sales average for the period ending December 31st, 1959, as reflected in the schedule answering interrogatory 40, isn't that right? A. It does.

Q. It being in interrogatory 40, \$86.54 as compared to \$86.73? A. Correct.

Q. Now, then, if I may bring it to a summary here, if I understand you correctly the figures shown on the U and O statement, the schedule answering interrogatory 17-A in the calculation of profit would have to be reduced by \$2.99 so far as costs for stumpage are concerned and increased in G and A and selling by \$6.50, being the \$4 plus the 2.50 you earlier mentioned, is that right?

A. No, I think—you asked me if the \$50 compared to Arizona Timber's costs, which it did as I recall. But it surely has not compared with Duke City's costs since that time. I mean Duke City

(Testimony of Thomas Cavanaugh.)

has had to do a lot of overhauling and a lot of other expenses that were incurred to put the plant back [1017] in operating shape.

Q. Well, while we are on that subject, overhauling is always charged off as an item of expense rather than capitalized, is it not?

A. It all depends, Mr. Romley, on the size of the overhaul. I mean if it's a—

Q. All of the overhauling that Duke City did with regard to the Winslow plant after it purchased from Gallagher was charged to expense, was it?

A. If—for instance in the case of the planing operation, the planing mill, if we received one month, we had a bill say for a thousand dollars, the next month we had a bill for a thousand dollars, I'm sure we would expense it just like Nagels would or like Arizona Timber did before. If we, all in one lump sum, did something that amounted to \$20,000, then I believe we would probably capitalize it and depreciate it over a certain length of time.

Q. Well, you heard the testimony of Mr. Liberman and Mr. Weinstein, did you not?

A. Yes, sir.

Q. Do you know of any of those items that were paid in connection with repairs to the machinery and equipment and with respect to overhauling of machinery and equipment, whether any of those were capitalized?

(Testimony of Thomas Cavanaugh.)

A. Are you speaking about the repairs to the planing mill? [1018]

Q. Repairs of any kind.

A. I don't remember all that they spoke about.

Q. Let's take the planing mill, if you remember that, sir. Was that capitalized or expensed?

A. No, that would be expensed.

Q. That would be expensed?

A. Because the bills came in, I know, so much each month and maybe it was a thousand dollars a month or something like that.

Q. Did you see this schedule that Mr. Weinstein prepared and presented in evidence here yesterday with regard to the planing mill repairs? [1019]

Q. Do you remember the schedule that was presented here yesterday that showed some repairs from Irvington and S. A. Wood?

The Court: Isn't that "J"?

Q. (By Mr. Romley): Have you seen Exhibit J before, sir? A. No, sir.

Q. Do you notice there it is entitled—I think it is in evidence—yes—entitled: Recap invoices, repair for 14 Woods Planer and shows items starting on March 6th, 1959 and going through March 30, 1960. Those items were all expensed, were they not?

A. Yes, Mr. Romley, that is not a capital item, that is an expense item.

(Testimony of Thomas Cavanaugh.)

Q. I understand that. I was afraid yesterday when Mr. Weinstein testified with regard to this that he was considering it, or leaving the impression that it might be a capital item. It is not?

A. No, sir.

Q. Getting back, sir, to this Winslow U & O statement that your prepared, Schedule answering 17-A. You show on that exhibit a net profit per thousand of \$15.63, is that right?

A. That is shown on the exhibit, yes.

Q. That is after all costs of every kind and after all depreciation, G and A and selling and everything, to the best [1020] of your recollection, based on your experience with Arizona Timber Company at the time you prepared this, is that right?

A. No. I still go back, Mr. Romley, it was an estimate. If I had Arizona Timber costs and compared this with it, I would find I probably made as bad an error as Mr. Liberman thought I did.

Mr. Romley: I move to strike the last statement, if your Honor pleases, what Mr. Liberman thought and what he "told me" to do, as a voluntary statement, hearsay.

The Court: I will disregard it.

Q. (By Mr. Romley): Let me get back, sir. When you prepared this schedule answering 17-A, it was your opinion, based on all of your experience extending back over ten or eleven years with the Arizona Timber Company and all of your knowledge of accounting, that to the best of your recollection

(Testimony of Thomas Cavanaugh.)

at that time the net profit from the operation of the Winslow mill was \$15.63 per thousand board feet, is that right?

Mr. Moore: We object to that, if your Honor please. The witness has already pointed out various items where he made mistakes, the various records he didn't have, various items were not included. Furthermore it is irrelevant and immaterial to any issue in this case.

The Court: The witness said he made an estimate. He may answer this.

The Witness: Please repeat the question. [1021]

(The last question was read.)

A. I don't think, Mr. Romley, I could ever say that the profit of the Winslow operation when it was run by Arizona Timber was \$15.63 per thousand.

Q. (By Mr. Romley): Are you saying that to the best of your recollection this figure was not correct at the time you prepared it?

A. No, I am not saying that either.

Q. Then is it to the best of your recollection that when you prepared this statement, the profit of the Arizona Timber Company was \$15.63 per thousand?

Mr. Moore: We object, if the Court please. It has already been answered.

The Court: I think you may ask him if it is an honest estimate, but he said it is an estimate. Now you are translating that into a recollection,

(Testimony of Thomas Cavanaugh.)

which he said he didn't have. You may ask him about his estimate, but I don't think he testified it was his recollection.

Q. (By Mr. Romley): When you prepared an estimate and submitted it to the insurance company and talked to the insurance agent about it and spelled out the items shown on this exhibit, this Schedule answering 17-A, and when in that exhibit you arrived and showed a net profit of \$15.63 per thousand it was your honest opinion at that time that represented the net profit of the Arizona Timber operation, [1022] is that right, sir?

A. No, sir. I really had no real opinion of what it was. If I in my honest opinion thought that was an absolute correct figure, I may not have even at that time discussed it with Mr. Liberman, but that is something I did not know. I knew what Arizona production costs were but I didn't know what the cost would be for the next year.

Q. I did not ask you about costs for the next year. I asked you if it wasn't your honest opinion that Arizona Timber Company profit was \$15.63 when you made this statement? A. No, sir.

Mr. Moore: We submit, if the Court please, the witness has answered.

The Court: The answer may stand.

Q. (By Mr. Romley): Did you have any opinion when you made this schedule with regard to the accuracy of the figure representing the net

(Testimony of Thomas Cavanaugh.)

profit was \$15.63? Did you have any opinion at that time whether the \$15.63 figure shown on this statement was accurate or not?

A. I had no opinion as to whether it was accurate. I had an opinion that figure should have been somewhere near it or I wouldn't have written it the way I did.

Q. In other words, you felt when you prepared and submitted this statement, honestly believed the net profit was somewhere near that \$15.63 per thousand, is that right? [1023]

A. Yes, that day, but as it appears I am not infallible.

Q. None of us are infallible, we recognize that, sir. As it appears now on the basis of expenses and items that have been charged against that by Duke City, you say it is less? A. Yes, sir.

Q. However, if—and I will ask you for the purpose of this question to assume this to be true—if you leave out this item of \$4.01 for interest, as reflected in Schedule F and if you show the same depreciation item that Arizona Timber Company showed, instead of the one that Duke City shows, you would be right at that figure of 15 some dollars, would you not, per thousand?

A. You say if I add back the interest to the 579?

Q. Yes, sir, add that back.

A. The interest would be 4.01. I would come up with, say, 9.80.

(Testimony of Thomas Cavanaugh.)

Q. Was it a greater depreciation charge per thousand taken by Duke City than taken by Arizona Timber Company on the same equipment?

Mr. Moore: If your Honor please, we submit that is not a fair question. It doesn't prove anything because the evidence shows——

The Court: The objection is sustained.

Q. (By Mr. Romley): You say, I believe it was your [1024] predecessor who prepared, or set up, I believe is the language you used, the depreciation items on this equipment and machinery purchased from Duke City? A. Yes, sir.

Q. Or purchased by Duke City from Arizona Timber? A. By Duke City.

Q. Are you familiar with the figures as they appear on the books of Duke City? I am speaking of the figures relating to depreciation.

A. Yes, sir.

Q. Do you know how the depreciation is computed with regard to these various items shown on Exhibit 12—no, Exhibit 11 in evidence?

A. Yes, I do.

Q. You have seen those. Some of those items are being depreciated over a period of time and some of them over a quantity of timber milled, is that right? A. That is correct.

Q. Do you recall what those are, sir?

A. The sawmill, for instance——

Mr. Moore: Do you have the schedule or list which we gave this information to Mr. Romley that would assist you, Mr. Cavanaugh?

(Testimony of Thomas Cavanaugh.)

Q. (By Mr. Romley): Can I ask you this question, sir, and I have before me the list which Mr. Moore gave me on [1025] the telephone.

Mr. Moore: If the Court please, he is going to read an armload of figures.

Mr. Romley: I am not going to ask him the figures. May I put the question?

Mr. Moore: Very well, I was trying to help you.

Q. (By Mr. Romley): Is this correct, sir, of those items that were purchased by Duke City from Arizona Timber Company, the following were set up on the books for depreciation over a period of two years, namely: The stacking sticks, foundations, spacers and roof boards, and also the trucks, trailers, auto patrols and Ford pickup, is that correct, sir?

A. I would like to take Mr. Moore's suggestion if I could and get that schedule.

Q. I thought we could save time.

Let me ask you these questions, sir, now that you have the exhibit before you. I haven't seen that exhibit but I am assuming——

Mr. Moore: You want to take a look at it? Let me show it to you. I don't want you to question it.

Mr. Romley: I am not questioning it, sir.

Mr. Moore: That is the one I read to you.

Mr. Romley: In the same order?

Mr. Moore: I believe I started at the top.

Mr. Romley: I don't believe I started at the bottom, [1026] Mr. Moore.

(Testimony of Thomas Cavanaugh.)

You show the sawmill there? A. Yes, sir.

Q. That was capitalized for depreciation with a figure of \$179,970? A. Yes, sir.

Q. That is being depreciated over a production of 90 million feet of either lumber or timber, is that right, sir?

A. That's right.

Q. Which is it, lumber or timber? It doesn't make too much difference, I wondered if you knew.

A. We are charging it off each month on lumber that goes through the sawmill. It would be on lumber.

Q. On lumber instead of net log scale?

A. Yes.

Q. You are showing a salvage value of 15 per cent on that item?

A. That is correct.

Q. The planing mill was capitalized for depreciation at 127,240 over the same production, 90 million feet? A. Yes, sir.

Q. Same salvage of 15 per cent?

A. Yes, sir.

Q. Is the same true with regard to the item for shop, [1027] lumber shed, dry kiln, bunkhouse and camp? A. Yes, sir.

Q. Now, with regard to the carriers and lift trucks, they are capitalized at \$59,550 over a period of twenty-four months? A. Yes, sir.

Q. At a salvage of five per cent?

A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. The stacking sticks, foundations, spacers and roof boards, capitalized at 80,000 and depreciated over a period of 24 months with no salvage, is that right? A. Yes, sir.

Q. And trucks, trailers, auto patrols and Ford pickup, capitalized at \$97,500, depreciated over a period of 24 months with five per cent salvage?

A. Yes, sir.

Q. I think I have covered all except office building and equipment, is that correct, sir?

A. Yes.

Q. With regard to the office building and equipment, do you have any opinion, sir, as to the value of the office building separate from the equipment and of the equipment separate from the office building, they are combined here?

A. No, sir, I wouldn't.

Q. Would you say it was reasonably fair and accurate to [1028] say half for each?

Mr. Moore: We object to that, if the Court please. The witness has stated he doesn't have an opinion so that he can segregate it to values.

The Court: Objection sustained.

Q. (By Mr. Romley): Did you know what office equipment there was that was sold by Arizona Timber to Duke City?

A. I had a rough idea, yes.

Q. At that time you were working for Arizona Timber? A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. Do you have an opinion based on your familiarity or knowledge of that equipment as to its reasonable value in November, 1958?

A. No, sir, I would not.

Q. Not at all? A. No, sir.

Q. Do you have any opinion as to its value new or new equipment replacing that? A. No, sir.

Q. Now, there was some land involved in this sale, was there not? A. Yes, sir.

Q. Some 66 acres at the mill site and 640 odd acres out in the woods? A. Yes, sir. [1029]

Q. Do you have any opinion, sir, as to the value of the land at the mill site there in Winslow?

A. No, sir, I do not.

Q. Or the land in the woods?

A. I am not qualified for that.

Q. Now, is this correct, sir, that under the depreciation schedule about which I have just examined you the rolling stock, or I shouldn't say rolling stock because there are other items that are not rolling stock that come into that category, but certain of the equipment, machinery, being charged out under depreciation over a period of two years and all of the remainder over a production of 90 million feet? A. Correct.

Q. With regard to all of the remainder then, based on the production of the first year and the contemplated production for 1960 and '61, you would say that all of the rest of this machinery and equipment is being depreciated over a period of three years, is that right, sir, substantially that?

(Testimony of Thomas Cavanaugh.)

A. If we met our goal of 30 million feet a year, our production goal, it will be over 90 million feet.

Q. Thus far you have been meeting that goal, have you not?

A. No, sir. I noticed the other day you mentioned [1030] 29 million feet cut. That was for a little over twelve months. That was about twelve and a half months. I imagine we cut about 28 million feet in the twelve months period last time.

Q. Thus far this year are you meeting that goal?

A. Very far from it. We were down in February and March because of the weather.

Q. Would it be a fair statement to say that if you do not produce 30 million in the first three years and thereby charging it out during that period of time that probably it will occur within three and a half years at the most?

Mr. Moore: I think that is calling for speculation, your Honor.

The Court: He may give his opinion if he feels he can; if he can't he can say so.

A. I am not really qualified, Mr. Romley, to tell what will happen. A fire could knock us out or weather, or a number of things.

Q. (By Mr. Romley): Assuming a normal operation, in other words, do you have an opinion if you were assuming a normal operation and by normal I mean such as have been experienced in the past ten or twelve years?

(Testimony of Thomas Cavanaugh.)

A. I would say, assuming normal operations, we would surely cut it out in at least four years.

Q. And the timber is available for that period of time? A. Yes, sir. [1031]

Q. And when you speak of four years you mean from the time Duke City went into possession, not from now? A. Correct.

Q. Now, the net result would be then, after charging out all of these items, some within two years or at the end of two years and others within three or four years, that four years that you have expressed, then your depreciation on those items then remaining in use would have been all used up so to speak, isn't that right?

A. Yes. This is a method though that is approved by the Internal Revenue Department.

Q. You don't know whether the Internal Revenue Department is going to approve a write off of 90 million feet, do you?

A. I know they are approving it in Albuquerque, our plants are writing off on the mill of the available timber.

Q. In any event, when this equipment has been written off, if we assume that some of that equipment will continue to be used with the result there will be no depreciation taken on that equipment, your profit per thousand increases by a corresponding amount, isn't that right, sir?

A. With one exception, Mr. Romley, that when in Albuquerque or New Mexico when we have gotten another sale, the Government makes us prorate

(Testimony of Thomas Cavanaugh.)

whatever undepreciated balance that we have over the milled timber, including the next sale, once we secure that sale. So it might change our rate, [1032] say, if we had a rate of \$1.50 on the sawmill and lucky enough to secure another sale they would make us work out a new proration, to come down to some other figure, plus that remaining one sale that we secured.

Q. Let's take the sawmill, sir. You have—you, I mean Duke City—has on its books for depreciation purposes \$176,970? A. Yes, sir.

Q. And it appears from the testimony here it will be depreciated within three or four years, to use your estimate, that is right? A. Yes.

Q. If we assume that sawmill is still being used after the four years are up, then there is no further depreciation taken on the sawmill, is there?

A. No. In the first place, I don't know that it is going to be used any more after 90 million feet.

Q. I am not asking you that, sir. You don't know of any plans to scrap it after the 90 million feet?

A. No, but I don't know if we have any more timber to run through it.

Q. You don't know that? A. Not yet.

The Court: Do you mean, Mr. Cavanaugh, if you buy more timber you must add it to the 90,000,000 and change your [1033] depreciation rate?

(Testimony of Thomas Cavanaugh.)

The Witness: Yes, sir.

The Court: Or basis rate?

The Witness: Yes, sir.

Q. (By Mr. Romley): What you are saying in effect is that if Duke City buys timber in this May 31 sale, then you have more timber available and that will be taken into consideration so far as the depreciation is concerned?

A. That is correct.

Q. But it will not affect the past depreciation already taken? A. No, sir.

Q. So you took during the first thirteen months roughly one-third of the depreciation on 176,000, having produced roughly 30 million feet?

A. That is correct, one-third on the depreciable figure of 150,000.

Q. After your fifteen per cent salvage?

A. Yes, sir.

Q. Is it possible for you to determine now, sir, on the basis of information presently available whether your depreciation on the sawmill will be less when you set up this new rate after this sale, if Duke City purchases that timber, or will be more than the existing?

A. If I understand your question you mean more or less [1034] per thousand basis?

Q. Yes.

A. It would come out some lesser figure than the present rate we are using.

(Testimony of Thomas Cavanaugh.)

Q. If it's an item, in your opinion, that properly can be expensed, and you had your "druthers," you would expense it rather than capitalize it, is that right? A. That's correct.

Q. Now, to the extent that there is any decrease in the amount for depreciation, assuming all other factors remain [1037] constant, insofar as production costs are concerned, and net profit are concerned, the net result would be to increase the net profit by the difference between the original depreciation per year as compared to the depreciation, new depreciation figure, is that right?

A. Are you referring to schedule 40, answer to schedule 40 or any—well, assuming—if I assumed that everything was the same, the sales price stayed the same, the wages were the same, the parts and supplies didn't go up, if the depreciation went down per thousand the profit, of course, would increase by that reduction.

Q. Now, were you to be a part of this group or syndicate to purchase the Arizona Timber Company or the Gallagher properties?

A. Yes, sir.

Q. And was that to purchase only the Arizona operation or both Arizona and New Mexico?

A. Both.

Q. And that was all of the lumber interests of Kaplan and Gallagher combined, is that right?

A. No, sir, just the interests of Kaplans, the Gallaghers were going to stay in the group.

(Testimony of Thomas Cavanaugh.)

Q. Were they to stay in in the same percentage as they had or do you know?

A. We never really talked about percentages, and Tom and [1038] Bob, of course, having the majority of the money would be the major owners, whatever was worked out.

Q. Did you sit in on conferences when this group discussed the advisability of negotiating for a purchase? A. Yes, sir.

Q. Were there several such conferences?

A. With—

Q. The group, I understand, was Wickens, Charlie Wickens, you, Tom Gallagher, Bob Gallagher, Yale Weinstein; anybody else?

A. No. I mean with whom?

Q. Did that group meet and discuss the various phases connected with the proposal to purchase?

A. Yes.

Q. Were you asked to make any projections with regard to the advisability from a profit standpoint of going into the transaction?

A. Yes, we met with the banks, the banks of New Mexico and I had to make some schedules, Mr. Romley. I don't recall—I know that I had to prepare a cash flow schedule and I had to prepare a depreciation schedule to show where our—if we broke even, where our money would come to make our payment on the loan that we hoped to get.

(Testimony of Thomas Cavanaugh.)

Q. Well, is it fair to say, sir, that you made some calculations to determine if this operation would be a profitable one? [1039]

A. No, sir, all——

Q. You didn't do that?

A. All my calculations for the bank were on a break even basis.

Q. I am not speaking for the bank. You weren't going into business just to break even, were you?

A. No, sir.

Q. You were going in with the idea that you would make a profit?

Mr. Moore: Your Honor, it seems to me this is irrelevant.

The Court: This is quite——

Mr. Moore: I object on that basis.

The Court: This is quite remote.

Mr. Romley: Sir?

The Court: It's quite remote, what they did about an entirely different deal.

Q. (By Mr. Romley): You mentioned earlier the general and administrative expense of Duke City, do you remember that, sir? A. Yes, sir.

Q. Do you have schedule D which is attached to—which is a part of schedule answering interrogatory number 40? A. Yes, sir.

Q. That purports to show the general administrative [1040] expense of Duke City for a period of eleven months there, is that right?

A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. You took a figure of \$5.34 per thousand and charged that against the profit in the Arizona operation, is that right?

A. The \$5.34, yes, would be prorated on the footage shipped by Arizona.

Q. Was that on the basis of the footage shipped or the footage produced?

A. The footage shipped, I believe. Let me, just a minute, make sure.

Q. Will you take a look, please?

A. It was on footage shipped.

Q. On footage shipped. Now, you showed there as general administrative expense a payment to former partner of \$9163, did you not?

A. Yes, sir.

Q. Is that a general and administrative expense?

A. We show it on our books that way, yes, sir.

Q. Was it, whether you show it or not? Did that man—who was this former partner?

A. C. J. Warren.

Q. Is he employed and performing services during this period? [1041]

A. I am not familiar with exactly the arrangement made with him when he terminated, this was before I went to work for the company.

But in our general and administrative expenses we show a payment to the former partner as an expense, and it's shown in our audited statement that way.

(Testimony of Thomas Cavanaugh.)

Q. Do you know when he terminated his connection with Liberman?

A. I think it was 19—no, sir, I don't know the exact date.

Q. Was it several years ago?

A. Two or three at least.

Q. Two or three at least. Did he, during any of the time you were there, which was from February—March 15, six weeks after this statement commences, did he, after March 15th, 1959, perform any services to your knowledge for this \$9163?

A. No, sir.

Q. Do you notice there the items for legal and audit, legal \$17,242?

A. Yes, sir.

Q. Do you know what that was for?

A. Yes, sir.

Q. What was it? A. Roughly.

Q. What was it? [1042]

A. Legal expense to Eiden and Johnson, it would all probably be Eiden and Johnson.

Q. Was any of it to Jennings, Strouss, Salmon and Trask?

A. I don't really recall.

Q. Was any part of this \$17,000 for legal services rendered in connection with the defense of this action?

A. It could be, Mr. Romley, but I do not know without—I'd have to look at the ledger sheet again and see what was in that figure.

Q. Is that ledger sheet here? A. No, sir.

Q. Is it in Tucson? A. No, sir.

(Testimony of Thomas Cavanaugh.)

Q. This next item for audit of \$13,425, is that for any auditing services in connection with the defense of this case?

A. I don't believe so. Again I'd have to check the record, though.

Q. Do you know what the total production of Duke City was during this period of time, February 1st to December 31st, 1959? You showed the total shipments, but you don't show on this exhibit, at least, how much timber was—how much lumber was produced.

A. Do you mean produced by our mills or—

Q. Produced by Duke City Lumber Company in all of its [1043] operations.

A. I mean—

Q. I assume this statement relates to all of Duke City's operations? A. Yes.

Q. Whether in Arizona or elsewhere?

A. Correct.

Q. All right. Now, you show shipments during the period of '56, nearly 57,000,000 feet. Do you know how much was produced during that same period of time?

A. And this is an assumption—but if the inventories were roughly the same the production figure would be between fifty-seven to sixty million feet.

Q. Do you know how much of the production, total production was by the Winslow plant?

A. Are you speaking now—

(Testimony of Thomas Cavanaugh.)

Q. During this period February 1 to December 31, '59?

A. I would estimate about twenty-six million, twenty-six and a half.

Q. Almost one half of the fifty-seven—or you said fifty-seven to sixty, did you?

A. Yes, we figure about forty percent, I think, of our production at Winslow.

Q. Now, these charges are spread, insofar as general and administrative expense, over the shipments made rather than [1044] production?

A. That's normal procedure in accounting in the lumber industry, I believe, Mr. Romley.

Q. And the same is true with regard to the selling expense, interest—well, the selling expense relates to the same production of nearly fifty-seven million feet, is that correct, sir? A. Yes, sir.

Q. But the interest expense, of course, is charged only against the Duke City shipment at Winslow?

A. Yes, this schedule we prepared was the interest on the Winslow operation alone.

Q. And if there are any built up inventories, the result is that these unit prices are increased, because they are not taken into consideration, isn't that true? A. I don't understand that.

Q. Well, you have computed your G and A and selling, and this other item I last mentioned; I think it was—yes, your general administrative expense and your selling expense over the total shipment of just under fifty-seven million.

(Testimony of Thomas Cavanaugh.)

Now, the fifty-seven million was not all of the lumber that was produced, you have told us you think it was about between fifty-seven and sixty million perhaps?

A. That was just an estimate, I mean normally, Mr. Romley, year in and year out your shipments should be the same or [1045] would be roughly the same as your production.

Q. Do you know whether your inventories were normal at the end of this period, December 31st, '59, or if there was any carry-over out of the ordinary?

A. No, if I were to guess I'd say they were perhaps a little bit less because we had poorer operating weather this winter than we did the year before.

Q. Now, during the thirteen months involving the Winslow operation alone, December 1st, '58, through December 31st, '59, you produced thirty million feet, twenty-nine or thirty million feet?

A. Twenty-nine something, yes.

Q. And you shipped only twenty-three million, is that right, sir?

A. (No answer.)

Q. Will you refer to Exhibit F, or schedule F where you show you charged off your interest expense over 23,485,199, is that right, sir?

A. Which page are you—

Q. Schedule F attached to the schedule answering interrogatory number 40? Does that indicate all of the lumber shipped during that period, namely 23,485,000 feet out of the Winslow operation?

(Testimony of Thomas Cavanaugh.)

A. Yes, sir.

Q. But you did produce twenty-nine odd [1046] million?

A. Yes.

Q. The rest of it would be reflected in inventory then?

A. Yes, that's correct at Winslow because we did start out with a—as far as our own production we would start out with a zero inventory over there.

Q. You started out with a zero inventory and ended up with a six million inventory in round figures? A. Between five and six, yes.

Q. Will you refer to schedule A, please, to the schedule answering interrogatory number 40. You show cash discounts there charged against the Winslow operation of \$1.77 per thousand board feet, is that right, sir? A. Yes, sir.

Q. How was that computed?

A. I'd like to say again, Mr. Romley, that I did all of this to the best of my ability in the time that I had.

Q. Are you saying this is not correct?

A. No, sir, I'm not saying it's not correct.

Q. All right, then will you tell us how you did this, please?

A. I took 2 percent of the total sales average of \$88.31.

Q. And in that total sales average you add—well, you mean 2 percent of the total sales average of \$88.31 on a total sale of 23,485,000 feet?

(Testimony of Thomas Cavanaugh.)

A. Yes, sir. [1047]

Q. Well, there wasn't any 2 percent to be charged to the 2,898,000 feet involved in the fire loss, was there?

A. No, but my thinking was on this that this was an unusual item, normally we would have sold that item to a customer who would have taken 2 percent, so to get an average figure I used the 2 percent.

Q. Well, is there a contra item on the books of Duke City for this 2 percent that you show here on \$304,000 for the fire loss?

A. The cash discount item on Duke City is just one item, Mr. Romley, I had to allocate or prorate a certain part to—we don't keep our cash discounts separately on Winslow, I had to allocate this 2 percent on the eighty-eight thirty-one on this schedule, in our books it would show whatever the total discounts were on all the company's operations on one account.

Q. Well, then, is this heading not correct when it speaks of sales and transfers from Winslow, this \$1.77 applied to all operations and not just the Winslow operation?

Mr. Moore: We object to that—

A. No, sir.

Mr. Moore: —if your Honor please, the witness has answered that he did his best to allocate these matters to the Winslow operation.

The Court: May I hear the question?

(Whereupon, the pending question was read by the [1048] reporter.)

(Testimony of Thomas Cavanaugh.)

The Court: He may answer.

A. If you took our sales to all of our customers on Duke City and applied the cash discount that we allow, I'm sure it would come out just about 2 percent of the total sales.

Q. Did you say that we allow, or that we allowed? A. Allowed, or the customer earned.

Q. Well, was Duke City—in calculating the profits made by Duke City in the Winslow operation was it charged with 2 percent on the fire loss of \$304,000?

A. In calculating profits where, on this schedule?

Q. For Duke City on this schedule.

A. On this schedule, yes.

Q. But actually you did not pay 2 percent on that \$304,000? A. That's correct.

Q. You didn't pay anything? A. No.

Q. Now, with reference to the item on schedule A, again to Albuquerque, \$555,000 to Albuquerque, did Duke City charge 2 percent on that item?

A. Again, Mr. Romley—

Q. For selling expense?

A. Again, Mr. Romley—

Q. Or wait, for cash discount?

A. If we sold this to a customer rather than another one [1049] of our operations we would have allowed them 2 percent.

Q. But you didn't sell them to a customer, did you? This was an inter-company transaction?

(Testimony of Thomas Cavanaugh.)

A. No. I know, but when I tried to work out the figures on Winslow I tried to separate it as a separate organization altogether dealing with——

Q. But in separating it you showed a cash discount on better than three and a half million dollars—wait a minute, better than \$860,000 on which you paid no 2 percent or any percent as a cash discount, is that right?

A. We could pay the—we could pay it on our books, I mean we don't.

Q. You didn't pay it to——

A. I mean we could allow one company the 2 percent and show it as income on the other, we don't do that. I mean it's just another bookkeeping item.

Q. In any event this item 4 on schedule A would be reduced from \$1.77 per thousand to about \$1.04 per thousand if you omitted the discount that you show and didn't take, and didn't pay on the fire loss and on the transfers to Albuquerque, is that right? A. (No answer.)

Q. Perhaps it will take a calculator to determine that, maybe it's not a fair question.

A. Yes, and that's interpretation, Mr. Romley, I mean [1050] between two people which way they would do it.

Q. Now, to the schedule answering interrogatory 40 again, more particularly Schedule D, you show your log hauling expense, your falling, skidding, loading and log hauling to amount to \$21.10 per thousand, is that right? A. Yes, sir.

(Testimony of Thomas Cavanaugh.)

Q. Now, that is the result of some of it being done by Duke City or its employees and some of it being contracted out to third parties, is that right?

A. In the twenty-one ten figure?

Q. Yes.

A. Part of it is—the hauling is done by Duke City, the other part is contracted.

Q. Now, the net result of your hauling—you do all the hauling, I'm sorry, sir? A. No, sir.

Q. You do part of the hauling?

A. We do part of the hauling and contract part of it.

Q. You do part of the falling, skidding and loading?

A. No, we contract all the falling, skidding and loading.

Q. Contract all that. But the net result of your doing part of the hauling and contracting out the felling, skidding and loading is that it costs you \$21.10 a thousand, is that right?

A. Yes, sir. [1051]

Q. Now, you can contract the entire, and did contract for some of it, the entire job of felling, skidding, loading and hauling for the same figure of \$21.10, is that right?

A. With reservations, this is a different type of logging and I believe it was a different area. One was a long log job, the other was short logs. And if you are speaking about the contract logging figure, I believe that it was done out of a different area

(Testimony of Thomas Cavanaugh.)

altogether than where we were doing our main logging, and this is not a statement of facts, this is my belief.

Q. It's just an assumption on your part?

A. Yes, sir.

Q. Do you know, sir, that you can contract the—or strike that, please.

Am I correct in this statement, sir: That contract logging includes felling, skidding, loading and log hauling? A. (No answer.)

Q. In other words, the term "contract logging" includes all of the two prior terms of falling, skidding, loading and log hauling? It means getting the timber from right there standing in the forest until it's delivered to the pond, that's your contract logging, isn't it?

A. Yes, both of the operators, though, do some road expense, too. I'm not——

Q. As a part of their charge? [1052]

A. Yes, I'm not familiar with how much they do.

Q. Well, is it true, sir, that so far as the cost of your operation is concerned you can contract the felling, skidding, loading and log hauling to one party for substantially what it would cost you to do yourself, Duke City to do?

A. I'm not qualified on that, Mr. Romley.

Q. You don't know? A. No, sir.

Q. You would agree that, if it were all contracted out, that then there would be no need of replacing any of the—these big trucks and carriers that were referred to in Mr. Weinstein's testimony?

(Testimony of Thomas Cavanaugh.)

A. Again I'm not—I don't feel I'm qualified to say.

Q. Do you know what use there would be for that equipment if you weren't doing the hauling yourself?

The Court: Well, Mr. Romley, he said he doesn't know that.

Mr. Romley: All right. I think I'm about through, your Honor, if I can have just one moment.

Q. (By Mr. Romley): I'm not sure if I asked you yesterday, sir, about the conversation when you and, I believe it was Bob Gallagher, went to Liberman's office on October the 9th or 10th. Do you remember whether I asked you any questions regarding that? A. No, you didn't. [1053]

Q. All right. In one of those—I think you said you—how many times did you go to Liberman's office during that period of 8th or 9th or 10th of October?

A. I just went the second visit—no—yes, the second visit.

Q. One time you went? A. One time.

Q. That was the 9th, was it, or the 10th?

A. That would be the 9th.

Q. The 9th. And who went with you?

A. Mr. Bob Gallagher, Yale Weinstein, Charlie Wickens and myself.

Q. And at that time did you say or someone of your party say to Liberman: "We are negotiating for the purchase of the Gallagher properties"? Not

(Testimony of Thomas Cavanaugh.)

using the term "Gallagher properties," but you know what I mean there?

A. Words to that effect, yes.

Q. And Liberman said, "Well, I feel I have a commitment, or I'm going to buy it," or words to that effect? A. No.

Q. What did he say?

A. He said, "I feel that I had a—" he said he felt that he had a deal in that letter that he received on the 12th.

Q. 12th of September?

A. Yes, and as I mentioned, I believe yesterday, that if— [1054] in other words, if he didn't, he didn't really want to deal with the group. [1055]

Q. He said he felt he had a deal or a commitment through that letter of September 12th?

A. I don't know about the word commitment; I believe he said he felt he had a deal.

Q. You are the one who told him on September 18 that the deal was off, weren't you?

A. Yes, sir.

Q. Pursuant to Mr. Gallagher's instructions?

A. Yes, sir.

Q. Did you talk to him again regarding that subject after September 18? A. I don't recall.

Q. So as far as you were concerned then, Mr. Liberman's statement that he had a deal was not correct because you told him that the deal was off from the man that was going to make the sale, isn't that right? A. Please repeat that.

(Testimony of Thomas Cavanaugh.)

Q. Please withdraw the question. That is all.

Redirect Examination

Q. (By Mr. Moore): Mr. Cavanaugh, Mr. Romley has qualified you as an expert on many subjects. Will you state your opinion to me, please, sir, as to what would be the reasonable amount of working capital necessary to operate the Winslow plant and [1056] operation?

Mr. Romley: I object to that, no proper foundation laid. I haven't qualified him as an expert in that respect.

Mr. Moore: I think he can testify to that without a lot of qualifications. I was a little facetious and I apologize.

Q. (By Mr. Moore): Are you familiar, Mr. Cavanaugh, with the amount of working capital used in that operation in a general way?

A. In a general way.

Q. What would be, in your opinion, the minimum amount of working capital necessary for a working operation?

Mr. Romley: I object to that, no foundation laid. He says, "I am familiar with the amount used," not the amount necessary.

The Court: I don't know whether he has an opinion.

Q. (By Mr. Moore): Do you have an opinion, Mr. Cavanaugh? A. Yes, I do.

Q. What is that opinion?

The Court: He may answer.

(Testimony of Thomas Cavanaugh.)

A. I feel it would be somewhere, oh, somewhere between five and \$600,000 probably.

Q. (By Mr. Moore): Let me ask you this, Mr. Cavanaugh, and I want to read to you Interrogatory No. 40 so that it will refresh your recollection. Interrogatory No. 40 reads [1057] as follows: What has been the average profit or loss earned, received or sustained on a board foot basis from the operation of the Gallagher property since the acquisition by the defendants?

Now, Mr. Romley has asked you a great many questions in minute detail about the various items on the schedule that was filed answering that interrogatory. Did you prepare that schedule?

A. I prepared part of it and part of it was done under my supervision.

Q. In the preparation of that schedule, Mr. Cavanaugh, did you use what you honestly believed to be fair and proper bookkeeping and accounting methods? A. I did, sir.

Mr. Romley: I object to that as immaterial, if the Court please, it is properly useable, not what he believes.

The Court: The answer may stand.

Q. (By Mr. Moore): Did you use what you considered to be accounting methods throughout the lumber industry, so far as you knew that?

Mr. Romley: We object to that as calling for hearsay, no foundation laid.

(Testimony of Thomas Cavanaugh.)

The Court: He may answer.

A. Again I am not an expert on the lumber industry practice. I used from what I knew of the Southwest area of [1058] Arizona Timber and New Mexico Timber and discussions I had had with different people in this area.

Q. You have told us that what records you had with Winslow were integrated with Duke City on all their operations. Did you to the very best of your ability prepare a schedule which you believed would correctly answer interrogatory No. 40 which I read to you? A. I did, sir.

Q. In addition to that, did you use exactly the same information and carry that on to March 31, 1960, in the schedule which we were talking about yesterday? A. Yes, sir.

Mr. Moore: We reoffer that exhibit, if the Court please, Exhibit L.

Mr. Romley: Same objection, your Honor.

The Court: Objection sustained.

Mr. Moore: That is all.

Recross Examination

Q. (By Mr. Romley): When you speak of working capital, you include in that category the accounts receivable, do you not? A. Yes, sir.

Q. Which are normal in every lumber concern doing business? [1059] A. Yes, sir.

Q. You don't mean by that that is cash that is lying in the bank?

(Testimony of Thomas Cavanaugh.)

A. No. Working capital does not mean cash.

Q. When you speak of working capital you mean receivables and what else?

A. Inventories and prepaid items, timber deposits and what normally shows on the balance sheet on the current assets and certain amount of operating cash to meet your going bills.

Q. Payroll? A. Yes.

Q. How much of that is operating cash?

A. Sir?

Q. How much of this 500 or \$600,000 estimate is operating cash?

A. I would think that maybe between 50 and 75,000 should be an amount you would need to meet the emergencies that arise, make timber deposits and what not.

Mr. Romley: That is all.

Redirect Examination

Q. (By Mr. Moore): One other question. Mr. Romley asked you about inventory; you said you started from scratch or from zero [1060] at the beginning of the year. Tell me whether or not there was lumber there which Arizona Timber Company had cut for Duke City under the milling contract and which Duke City paid Arizona Timber for?

A. Yes, there was about four and a half million feet of Arizona Timber shipped out for Duke City.

Mr. Moore: That is all.

(Testimony of Thomas Cavanaugh.)

Recross Examination

Q. (By Mr. Romley): I am a little confused, sir. You started your inventory with zero?

A. No. In answer to your question in the interrogatory I believe it asked something about production and so forth from acquisition.

Q. How does this lumber you shipped for Arizona Timber enter into it?

Mr. Moore: We object to the form of the question. There is no evidence Duke City shipped any lumber.

Q. (By Mr. Romley): Is it Duke City lumber that was shipped?

A. It was Duke City inventory shipped by Arizona Timber.

Q. That was there at the mill site when you took over and belonged to Duke City, is that right?

A. Belonged to Duke City, but most of it was shipped by [1061] Arizona Timber still under the milling agreement.

Q. Was that before or after December 15?

A. That was after. But the shipping didn't terminate until March 1st.

Q. It wasn't anything Duke City produced prior to December 15? A. No, sir.

Mr. Romley: All right, thank you.

Mr. Moore: That is all.

The Court: We will stand at recess until 1:30.

(Noon Recess) [1062]

May 12, 1960, 1:30 o'clock p.m.

Mr. Moore: Mr. Grevey.

JOSEPH GREVEY

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): Will you state your name, please? A. My name is Joseph Grevey.

Q. How do you spell your last name?

A. G-r-e-v-e-y.

Q. Where do you live, Mr. Grevey?

A. I live in Albuquerque, New Mexico.

Q. And you have lived there for how long?

A. I have lived there for sixteen years.

Q. Where were you born?

A. I was born in Poland.

Q. And did you go to school in Poland?

A. Yes, sir.

Q. How far in school did you go in Poland?

A. I finished high school in Poland.

Q. Did you learn any more than the English language in [1063] Poland? A. No, sir.

Q. I don't mean English, I used the wrong term. Did you learn more than the Polish language in Poland? A. Yes, sir, I learned German.

Q. After you got through high school where did you go?

A. After I was through high school I went to Czechoslovakia to higher studies.

(Testimony of Joseph Grevey.)

Q. I didn't understand the answer.

A. I went to Czechoslovakia for higher studies.

Q. Higher studies. What did you study?

A. I studied chemical engineering.

Q. Did you graduate as a chemical engineer?

A. Yes, sir.

Q. After you completed your schooling, where did you go?

A. From there I went to Paris, France.

Q. What did you do there?

A. There I went to work with my brother, Maurice Liberman.

Q. Doing what type of work?

A. Well, I was in the lumber business.

Q. How long did you remain in the lumber business in Paris with your brother, Maurice?

A. I remained with him about two years, a little under two years.

Q. Then what did you do? [1064]

A. Then I left and I joined my oldest brother, who at that time lived in Paris also, David Liberman. I joined him in a dress manufacturing business.

Q. How long did you remain in that business?

A. I stayed with him approximately four years or so.

Q. Were you in the French Army during World War II?

A. Yes, sir.

Q. When did you go into the Army?

A. I was drafted in August of '39.

(Testimony of Joseph Grevey.)

Q. How long were you in the Army?

A. I was in the Army until after the Armistice.

Q. Were you captured during the war?

A. Yes, sir.

Q. You were a German prisoner of war?

A. Yes, sir.

Q. How long were you a prisoner?

A. Five days.

Q. Then what happened?

A. Then I escaped, sir, to the unoccupied zone because France was at that time divided into occupied and unoccupied.

Q. Now, which Armistice were you talking about, Joe?

A. I am talking about the Armistice between France and Germany.

Q. Were you back in business after you escaped?

A. Yes, sir, after I escaped and had been discharged I [1065] returned as a civilian to Paris to—

Q. And were there for how long?

A. There I stayed until the end of '41.

Q. Then what did you do?

A. Towards the end of '41 I was in Paris taking care, liquidating the business of my older brother, David, who left France for South America. I received a message from my younger brother, Jack, who was discharged at that time and was in the occupied zone that he is about to leave for South America and if I want to see him for me to try to get over there.

(Testimony of Joseph Grevey.)

Q. What did you do?

A. Well, I tried to cross the borderline. I made two attempts and didn't succeed and came back to Paris. Then I met an acquaintance of mine who told me that he was crossing the borderline practically every weekend to go to see his wife who lived in Nice, South France, and I asked him whether I could join him at this crossing and he said yes.

So it was on a Sunday, he—we met at his apartment and I joined him, and when we—anyway, when we came to the crossing to the last village on the border, and we walked to see the person, there was a lady who was to cross us, we were stopped by the Storm, German Stormtroopers. They asked us what we are doing there, and conducted us to the police station.

Q. Now, you left France when to come to the United States? [1066]

A. I left France the 10th of January, '42.

Q. Now, in order to do that, did you have to sign some oath with respect to bearing arms against Germany?

Mr. Romley: Just a moment, your Honor. Certainly a little background is all right, but I think this is all immaterial.

Mr. Moore: No, it is material and very material, if the Court please, in view of the deposition that Mr. Romley introduced in evidence. He spent a page and a half with Mr. Liberman as to how it hap-

(Testimony of Joseph Grevey.)

pened this man's name was Grevey and that's exactly what I'm leading to, the exact reason for that change of name.

The Court: You may ask him that directly, and let's—let's get it done. You are going into too much detail.

Mr. Moore: Well, I wanted to get the background, your Honor, to explain it. I don't want to go into too much detail on it.

Q. (By Mr. Moore): After you came to the United States—I would like to get an answer to the last question first, your Honor, then go ahead, whether or not he had to sign an oath with reference to bearing arms.

A. In order to obtain an exit visa from France I had to sign a document whereby I will not take up arms against Germany again.

Q. Now, after you came to the United States were you in [1067] the United States Army?

A. Yes, sir.

Q. In what branch of the Service?

A. I was drafted first into the Medical Corps, but was transferred later to the Intelligence Service.

Q. To the Intelligence Service?

A. Yes, sir.

Q. At that time did you sign an application for naturalization? A. Well, as soon as—

Q. As a citizen of the United States?

A. As soon as we landed in New York, very soon after, very shortly after we signed an intention of

(Testimony of Joseph Grevey.)

becoming a citizen, an application of intention for naturalization.

Q. Then after you got in the Army did you sign any papers with respect to the naturalization?

A. Yes, sir, as soon as we arrived in Camp Richard, that was the Intelligence Service camp, they took us to barracks and asked us to fill out application for naturalization papers.

Q. Now, at that time did you fill out that application changing your name to Joseph Grevey?

A. Yes, sir.

Q. And why did you do that?

A. I did it because I was twice already a prisoner in the German hands, once as a soldier and once as a civilian when I [1068] tried to cross the demarcation line. I knew also that in this camp we are going to be trained to possibly for debarkation in or a drop, parachute drop in North Africa, that I may be dropped behind the enemy lines or serve as an interpreter. Anyway, I thought it best for me, should it happen again to me, not to fall in the hands as Liberman, and that's why I changed my name.

Q. How long were you in the United States Army?

A. I was in the United States Army for about eight months, sir.

Q. And you received a medical discharge?

A. Yes, sir.

Q. Then did you go to work in New York?

(Testimony of Joseph Grevey.)

A. Yes, sir, I went to work to Jutland, New Jersey with a drug manufacturing company.

Q. When did you—or how did you happen to come to Albuquerque?

A. At the time before the event that made me come to Albuquerque I worked in New York in a perfume making laboratory, and I received a call from my brother, Maurice, in the evening where I could come and join him because he needs help.

Q. And did you come out and join Maurice in the lumber business in Albuquerque?

A. Yes, sir.

Q. Are you now a partner in Duke City Lumber Company? [1069]

A. Yes, sir.

Q. What percentage of the partnership do you own?

A. I own 39 percent.

Q. What part of the operation of the business do you handle?

A. My duties are predominantly limited to production, the quality control, improvements of the plant, new installations, supplies, labor relations.

Q. Do you have anything to do with the financial end or business or administrative end of the business?

A. No, sir.

Q. That part of it is handled by whom?

A. By my brother, Maurice.

Q. And your brother, Jack, I believe, also is a partner in Duke City Lumber Company?

A. Yes, sir.

Q. In early 1957 did Duke City Lumber Company have some negotiations with reference to leasing a tract of land in Winslow for a mill site?

(Testimony of Joseph Grevey.)

A. Yes, sir.

Q. What did you do with reference—I don't want all the details, Joe—with reference to that site in respect to setting up a new mill over there?

Mr. Romley: We object to that as entirely immaterial, your Honor. [1070]

The Court: I don't see the materiality in it, Mr. Moore.

Mr. Moore: Well, I wanted to show that as a result of that, the negotiations with Gallagher occurred, and this milling agreement was the ultimate result, actually, of the fact that they were going to build a mill in Winslow. They did have a site, the evidence would show.

The Court: Well, the milling agreement is in evidence.

Q. (By Mr. Moore): Mr. Grevey, let's move to later in 1958. Were you present at any negotiations with Mr. Gallagher, Tom Gallagher, with respect to a merger of Duke City Lumber Company and New Mexico Timber Company?

A. Yes, sir, I was present at one meeting at Mr. Gallagher's office.

Q. Later were you present when there were negotiations with Mr. Gallagher with respect to the written proposal of September 12th with respect to the sale of the Winslow plant and timber to Duke City Lumber Company?

A. Yes, sir, I was present at that meeting.

Q. Tell me as best you can what those negotiations were, first with respect to the price and terms?

A. Well, one meeting—

(Testimony of Joseph Grevey.)

Mr. Romley: Just a moment, your Honor, I object to that. That's in evidence here, that letter of September 12th is there. [1071]

The Court: What does this bear on, Mr. Moore? I don't see any—

Mr. Moore: The modification of it later that we have talked about. It's not of great importance on the issues, your Honor, but to get the full picture is what I was trying to do.

The Court: Well, the objection will be sustained.

Q. (By Mr. Moore): After—first, were you—just yes or no—were you present when the draft of the September 12th was signed and the check signed and sent over to Mr. Gallagher?

A. Yes, I was present when Maurice Liberman signed the proposal and attached the check.

Q. After that did you learn from your brother of the telephone call from Mr. Cavanaugh?

A. Yes, sir.

Q. On September 18th? A. Yes, sir. [1072]

Q. Now, after September 20th, did you learn from your brother of his trip to Winslow and his conference with Mrs. Nagel and Mr. Jenkins in Winslow on September 20th? A. Yes, sir.

Q. Can you tell us what your brother reported to you with respect to the ultimate arrangements or understanding that was reached?

A. Yes, sir.

Q. As a result of that conference?

Mr. Moore: We object to that as being hearsay, your Honor.

(Testimony of Joseph Grevey.)

The Court: That would be hearsay.

Mr. Moore: I think that is admissible, your Honor, under the memorandum which Mr. Pfister brought over to the Court, the varying theories to show the state of mind of these people, their understanding of what agreement had been reached, why the letter was written as it was, it all ties together. And certainly that evidence, I believe under the state of the record in this case is admissible.

The Court: There may be an occasion when what information a person has is admissible for state of mind, but you have first to get to that point that is pertinent, where his state of mind is pertinent, and this is just, at this stage of the examination of the witness is something his brother told him. There is no basis for showing materiality of his [1073] state of mind.

Q. (By Mr. Moore): Was this statement made or report made to you, Mr. Grevey, by your brother before the September 23rd letter agreement was written? A. Yes, sir.

Q. Were you present with your brother Maurice when the letter was written and did you read it?

A. Yes, sir.

Mr. Moore: Now we offer, if the Court please, the background to show what negotiations have been and what was ultimately reached to show the understanding of these people, to show what agreement they had made.

Mr. Romley: Object to it as self serving and hearsay.

(Testimony of Joseph Grevey.)

The Court: Self serving wouldn't be a valid objection, but it is hearsay.

Mr. Moore: This is a partner, your Honor, that is bound by this agreement, it is a part of his business. It is a contract to show his state of mind and his understanding.

The Court: No. Mr. Liberman, Mr. Maurice Liberman represented the partnership in this.

Mr. Moore: In the negotiations.

The Court: In the negotiations. And he went and talked with these people and they had certain conversations and he reduced this thing to writing and they signed it. What passed between those people and all of the facts and transactions [1074] that occurred between them and his writing of it and probably his state of mind might be material, but this witness was never any part in that. He is bound by it, but no matter what his understanding was it wouldn't enter into the interpretation of this agreement. He was no part of the interview and conference out of which the agreement arose.

Mr. Moore: Your Honor, it would be material on this point, to show the state of mind and understanding of this witness as a partner and a party defendant in this lawsuit as to what agreement he acquiesced in with his brother, his understanding.

The Court: No, he is bound by the agreement regardless of what he understood.

Mr. Moore: It is also material to show why, and I will offer the discussion between them, the six

(Testimony of Joseph Grevey.)

month extension provision was added to the letter, or put in the letter.

The Court: Mr. Liberman drew it.

Mr. Moore: With this man's assistance.

The Court: Mr. Maurice Liberman testified about the matter and to that extent I don't believe there is any objection to that when he was asked about it. But this witness' understanding or what somebody told him certainly can't be the criterion for interpreting an agreement with other persons.

Mr. Moore: It might be the criterion to [1075] help determine whether there ever was an agreement.

Let me make a brief offer of proof, if the Court please, and I will not waste time on it.

The Court: Very well.

Mr. Moore: The defendants offer to prove—and this I cannot avow will be in the exact words the witness would say, because I don't recall the exact words—that in substance this witness, if permitted to testify, would testify that between the time of Mr. Liberman's visit to Winslow on September 20th and the signing of the September 23rd letter agreement, they discussed the matter between them, that they discussed a business venture, they discussed the advisability of going into it from a business standpoint and that they discussed the fact that this agreement was to be an agreement that if either the plaintiffs Nagel Company or the de-

(Testimony of Joseph Grevey.)

endant Duke City Lumber Company negotiated and obtained a proposal from the Gallagher companies, as we have called them, the other party to that agreement would have a right at the time that that purchase was consummated to participate in it, or at the time the commitment was made for it they would have the right to participate on a fifty-fifty basis. That they discussed the April 30th date which had been discussed in Winslow, and that they determined, Mr. Grevey and Mr. Liberman, that it would be to their best interests, as well as the Nagel company in their opinion, that the agreement be extended [1076] indefinitely by six month extensions, so that if at any time until the agreement was terminated as provided either party got a proposal to purchase this plant, the other party would have the right at that time to participate in that purchase on a fifty-fifty basis.

The Court: The objection is sustained and the offer is refused.

Q. (By Mr. Moore): Were you present, Mr. Grevey, in the office on the 23rd when Mr. Jenkins and Mr. Nelson came in to sign the letter?

A. No, sir.

Q. In order to keep my records, your Honor, I will have to ask another question and make an offer in line with the Court's ruling. I don't want to appear to be wasting time by so doing.

Did Mr. Liberman discuss with you after he had a telephone call from Mr. Jenkins the September 24th letter which was prepared and mailed to Mrs.

(Testimony of Joseph Grevey.)

Nagel, and that, to identify it for you, is the one with respect to the seven year deal on the mill?

A. Yes, sir.

Q. What was that discussion?

Mr. Romley: We object to that on the ground it is hearsay.

The Court: Objection sustained. [1077]

Mr. Moore: We offer to prove, if the Court please, by this witness that they discussed the September 23rd letter and the contents that should be in it, and that—it was September 24th, did I say 23rd?

Mr. Romley: I think you said 23rd.

Mr. Moore: I mean the 24th. That the contents that should go into that letter and that their state of mind when the letter was sent out was that they were willing to make a binding agreement according to the terms of that letter provided and provided only that the Nagel Lumber & Timber Company execute an acceptance of it and thereby commit the Nagel Lumber & Timber Company to a mutual obligation with respect to the sale of the mill upon the terms and conditions therein set forth particularly with reference to the manner and means of determining the purchase price.

The Court: The offer is refused.

Q. (By Mr. Moore): Now, Mr. Grevey, do you recall the time that Mr. Liberman, your brother, went back to New York to discuss these matters with the Kaplans and the Gallaghers?

A. Yes, sir.

(Testimony of Joseph Grevey.)

Q. Now, do you remember the date of October 16th that we have heard discussed here in the courtroom? A. Yes, sir.

Q. Did you receive a telephone call from your brother Mr. Liberman from New York on the morning of October 16th? [1078] A. Yes, sir.

Q. Approximately what time did you receive that call?

A. That was about five o'clock in the morning.

Q. Five o'clock Albuquerque time?

A. Yes, sir.

Q. Did your brother Mr. Liberman report to you concerning the negotiations that he had had with the Gallaghers and the Kaplans? A. Yes, sir.

Q. Did he give you the terms of the proposition they were negotiating on? A. Yes, sir.

Q. Did you have any discussion with him about that deal? A. Yes, sir.

Q. What was that discussion?

Mr. Romley: I object to it on the ground of hearsay.

The Court: What is this leading to, Mr. Moore?

Mr. Moore: The same thing I have offered, your Honor, leads to the proof he made the calls, they were discussing talking to Mrs. Nagel, they discussed the terms and the price—

The Court: Discussed talking to Mrs. Nagel?

Mr. Moore: Yes, that he had called her as soon as he got through with this call. If the Court please, I can limit it by somewhat leading questions to get to the subject matter and save time. [1079]

(Testimony of Joseph Grevey.)

The Court: Insofar as it might relate to Mr. Maurice Liberman's state of mind, be some circumstantial evidence of his state of mind. But insofar as it might explain some action this witness took, not for the truth of what Mr. Maurice Liberman told him but as a predicate for the action he took, it may be admissible. But those are the only purposes for which it is admissible. I will hear it and if it isn't circumstantial evidence on the state of mind or intention of Mr. Maurice Liberman or if it bears or explains acts or conduct taken by this witness it will be received, not the latter instance, not as proof of the facts that Mr. Maurice Liberman told him, but as a fact upon the basis he acted, if it doesn't do that I will disregard it.

Mr. Romley: Is it understood, so I don't interrupt with my objection, that it goes to all these conversations on the ground of hearsay, or do you prefer I make the objections?

The Court: The record may show a continuing objection to all that and my ruling is that except in particulars, and I don't know that it will actually accomplish that, but I will receive it and consider it if it does bear on Maurice Liberman's state of mind or the basis upon which this defendant acted, otherwise it will be disregarded.

Q. (By Mr. Moore): Mr. Grevey, directing your attention to the first, the early call you are talking about on [1080] October 16th, tell me very briefly

(Testimony of Joseph Grevey.)

what Mr. Liberman said to you about the terms of the transaction he was negotiating in New York with the Gallaghers and Kaplans?

A. He told me they started out with \$750,000 for the plant and \$17 for timber; that they came down, that they made them come down to \$650,000, the same price for timber. That it was all credit. And he wanted to know what I think about it. I told him that the price was outrageous, it was too high. This is the same plant they offered us a few days ago for \$500,000. That the plant was obsolete and in very poor condition, that it will take quite a bit of money, cash to rehabilitate it.

Q. Let me ask you, was there any discussion about Mr. Liberman telephoning Mrs. Nagel from New York?

A. Yes, sir. He told me that he has to call Mrs. Nagel to find out whether she wants to take up this offer and if so to come out to New York.

Q. Did you make any comment to Mr. Liberman about his telephoning Mrs. Nagel or the transaction with Mrs. Nagel?

Mr. Romley: Your Honor, I assume the objection goes to both conversations, that is Mr. Grevey to Mr. Liberman as well as——

The Court: Yes. As a matter of fact, the only part of it I will consider is the statement of Mr. Maurice Liberman that he intended to call Mrs. Nagel. The rest of it is [1081] clearly hearsay.

(Testimony of Joseph Grevey.)

Mr. Moore: Very well, then I will not go into the remainder of that, if the Court more or less directs me in that manner.

Q. (By Mr. Moore): Let me ask you this one question, Mr. Grevey. Was the transaction agreeable to you in the event that Mrs. Nagel did say yes and came up and participated in it on a fifty-fifty basis?

Mr. Romley: We object to that as calling for a conclusion and immaterial.

The Court: It is immaterial.

Q. (By Mr. Moore): Now, did you receive a second call from Mr. Liberman from New York on the morning of October 16th?

A. Yes, sir. Shortly after the first conversation I received another call from him.

Q. How long after, do you have any recollection?

A. Somewhere between half and hour and an hour.

Q. Tell me the substance of that conversation, that is the substance of what Mr. Liberman said to you?

Mr. Romley: Same objection, hearsay.

The Court: I will hear it on the basis as indicated.

A. My brother told me that he called Mrs. Nagel; as a matter of fact, told me he called her twice. That he gave her the terms, price of the offer and asked her whether she wanted to participate in it and if so to come out, that he had to give [1082] an answer

(Testimony of Joseph Grevey.)

to the Gallagher group by eleven o'clock the same morning. That he wanted her to come in because it was quite an understaking for us. And she answered him that she is not interested and will not take up his offer.

Q. When he told you that did you have some lengthy discussion with Mr. Liberman about the advisability of going ahead, Duke City going ahead and buying it alone?

A. Yes, sir, quite a discussion.

Q. What was that?

Mr. Romley: We object to that as immaterial.

The Court: I am going to hear it and I will sift it out when I get it all.

A. I told my brother that I didn't care to go into this deal if we were to be alone without Mrs. Nagel, that it was too big an undertaking for us, too big a commitment for the future for us, that we have enough, we have enough debts as it is already in the future, Aztec timber. That we purchased that. I myself had some personal debts and I don't care to go into it. However, if he wants to do it we won't break up the partnership, I will go along with him, but I am definitely against it.

Q. Then was there anything said in that conversation about your sending your comptroller to a bank in Albuquerque that day?

A. Yes. In this conversation Maurice asked me to see [1083] in the morning, to see our comptroller and for him to go to the bank and arrange for a line of credit..

(Testimony of Joseph Grevey.)

Q. Did you do that? A. Yes, sir. [1084]

Q. Now, did you have a later telephone call from Mr. Liberman on that same day?

A. Yes, sir, I had another call after lunch from my brother telling me that he received——

Mr. Romley: This is still in the same condition, your Honor?

The Court: Yes, yes. I may say that as far as the conversation that the witness has just related, I will receive the part of it to the extent that Mr. Maurice Liberman told him that Mrs. Nagel wasn't coming in, and that they would have to handle it alone, and the further part that, at the request of Mr. Maurice Liberman, dispatched the comptroller to the bank. Subject, however, to showing that that is material. I assume that's directed at some theory of estoppel that is in here, but I mean that has to jell or else the whole thing is disregarded.

Q. (By Mr. Moore): Now, did you have a later conversation after the first two we have mentioned?

A. Yes, sir, I had, after lunch, another call from my brother. He told me that he received a wire from Mrs. Nagel where she refuses to send him, to give him a release of the agreement we had, because he asked—because—on the conversation I related she told my brother to go ahead and buy it himself, if he wants to, but she said that she doesn't want to participate and that she would release him from the [1085] agreement. So he called me when he received that wire saying that she doesn't wish to release him from this agreement.

(Testimony of Joseph Grevey.)

Maurice was very upset. I asked him, "What does this wire mean?" He said he doesn't know, that he is going to try—he tried to call her and is going to keep on trying to call her again.

Q. In that conversation, Mr. Grevey, did Mr. Liberman tell you whether or not he had already said to the Gallaghers that the offer was accepted?

A. Yes, sir.

The Court: This last conversation will be disregarded as hearsay, that is the third telephone conversation.

Mr. Romley: Is it the third or fourth, your Honor? He has referred to two afternoon calls.

Mr. Moore: No, he has only referred to one afternoon call.

The Court: I think it's the third telephone call.

Q. (By Mr. Moore): Now, Mr. Grevey, were you present at any of these negotiations or conferences, I would call them, in Albuquerque when the final draft of the agreement of November 6th contract was drawn? A. Yes, sir.

Q. Where was that meeting held?

A. That was held at the library of Judge Johnson's.

Q. Do you remember who was present? [1086]

A. Yes, sir, who was present was Judge Johnson, Mr. Burloch, who represented the Gallagher and Kaplan group, Judge Moise and his associate, Mr. Jones, Mr. Rosenthal, Yale Weinstein, Tom Cavanaugh, my brother.

(Testimony of Joseph Grevey.)

Q. Now, the thing that I wanted to ask you about in that meeting, do you recall any discussion with respect to Duke City being able to assign all or any part of this contract? A. Yes, sir.

Mr. Romley: Object to that, if your Honor please, on the ground it's necessarily based on hearsay, not the best evidence and not binding.

Mr. Moore: It's not hearsay, they were all there.

Mr. Romley: The plaintiffs were not there.

The Court: This is the agreement between the——

Mr. Moore: November 6th, 1958 contract.

The Court: Between the Gallaghers and the Libermans?

Mr. Moore: Yes.

The Court: The objection is sustained.

Mr. Moore: Let me make a short offer, your Honor, which will cover what I had in mind.

The defendants offer to prove that the provision with respect to assignability of that contract where the defendant purchaser was given the right to assign not more than 50 percent to one of three, or to three different concerns therein named, upon condition that Duke City retain and maintain [1087] the management of it as long as there was any indebtedness due, that that provision was inserted at the request and insistence of the seller, and particularly Mr. Tom Gallagher.

The Court: The ruling will stand.

Q. (By Mr. Moore): Mr. Grevey, you had been over to Winslow, I assume, prior to this November

(Testimony of Joseph Grevey.)

6th contract at some time during the operation under the milling contract with Gallagher?

A. Yes, sir, several times.

Q. You had seen the plant and the mill?

A. Yes, sir.

Q. Did you go back over there after the contract of purchase was executed in November of 1958?

A. Yes, sir.

Q. Do you recall about when it was you went over?

A. It was shortly after we acquired it, I don't recall the date. It was shortly afterward.

Q. And did you look the mill over at that time?

A. Yes, sir.

Q. What did you observe with reference to the condition of the machinery and equipment?

A. I observed that the plant was in very poor shape, which I knew before we acquired it to some degree. I was particularly concerned with the planing mill, the kilns and the burner. I came back to Albuquerque and sent out our master [1088] mechanic, Mr. Andy Steward, to go out there and come with the full—to bring the full report, what can and should be done.

Q. Now, were you present the other day when Mr. Steward testified? A. Yes, sir.

Q. And you heard his description of what was done and what transfers in equipment were made and so forth? A. Yes, sir.

(Testimony of Joseph Grevey.)

Q. Without going into that detail, I'm simply going to ask you, was that statement substantially correct? A. Yes, sir.

Q. Now, since that acquisition, Mr. Grevey, I believe the evidence discloses that a stacker had been installed in the mill? A. Yes, sir.

Q. What kind of—describe briefly what kind of a machine that is and the purpose that it serves?

A. The purpose of a stacker is to put the lumber on sticks for drying automatically without too much manpower.

Q. And did you deem it advisable and necessary for proper operation to install such a piece of equipment?

A. Yes, sir, it was installed on my advice.

Q. Now, what has been the experience you have had with the dry kilns that are located up there?

A. The experience, my experience was that the kilns were [1089] doing a very poor job. We had complaints from our customers, I had complaints especially from our molding plant foreman where most of our upper grades, which go through the kilns, were dried.

There is a condition called a case hardening that makes the lumber—degrades the lumber as far as quality is concerned. In certain occasions it becomes unusable for certain purposes.

Q. Now, what did you do with respect to the installation of additional equipment or repairs in the kilns?

(Testimony of Joseph Grevey.)

A. Well, we—first, we called up Mr. Reese from Portland to give us an estimate what it would cost to rehabilitate the kilns. My intentions were to tear down the small kiln and replace it by a new one. However, we were sidetracked by some other matters and I left on vacation. However, prior to going on vacation I received—asked and received two bids for replacing the small kiln, and I left instructions to, when we get the bids, to award it to the lowest bidder, of course.

Q. Now, have you—what about the installation of conditioning equipment, did you put in any conditioning equipment in your kilns?

A. Yes, sir, we put in additional sprinklers, we put in a water pump, we put in panels, as a matter of fact I hired a special man who is familiar with blow pipe installations and kilns, and he is on a full time salary now with us to do [1090] improvements.

Q. You have not yet installed new kilns?

A. Not yet.

Q. Are you still having trouble with the lumber that comes out of those dry kilns?

A. Yes, sir, we have the same trouble despite the money we've spent as you have seen by the samples Mr. Hickman brought.

Q. Now, if you have better kilns does that mean that you will get a higher price for the lumber?

A. No, sir.

Q. What does it mean?

A. It means only that we will be able to use and sell our lumber.

(Testimony of Joseph Grevey.)

Q. And if it's not getting proper results in the kilns it affects its market value in that price range?

A. The market—the price has nothing to do with the quality of drying. When we sell lumber, it's assumed that it's properly dried, and there is a price for it. There is no price for properly dried lumber or improperly dried lumber. When a shipment is made improperly dried we get it rejected or we have to make some kind of a settlement with the customer.

Q. Now, do you still at this time have to haul some of your rough, green lumber to Albuquerque for proper treatment in the kiln?

A. Yes, sir, we continue hauling rough green lumber to [1091] Albuquerque.

Mr. Moore: Excuse me just a moment, if your Honor please. That's all.

Cross Examination

Q. (By Mr. Romley): What do you do with this rough, green lumber that you haul to Albuquerque, Mr. Grevey?

A. We put it in our kilns for drying.

Q. And then do you process it otherwise in your Albuquerque mill?

A. Yes, sir; yes, sir.

Q. Make molding and other materials out of it?

A. Yes, sir.

Q. Now, the only difference, insofar as this particular green lumber is concerned, is that instead of receiving it already dried from Winslow you take

(Testimony of Joseph Grevey.)

the same lumber you otherwise would get and dry it in Albuquerque and then mold it and do what you want with it, is that right?

A. Well, it's an additional footage, additional lumber that we wouldn't have received otherwise.

Q. Now, you say that you left instructions before you went on your vacation to award the bids for a small kiln to the lowest bidder, is that right?

A. For a kiln of certain specifications. [1092]

Q. When was that that you left those instructions?

A. That was last year in the end of June, '59, end of June.

Q. Better than ten months ago? A. Yes.

Q. You still haven't let the bids?

A. Please?

Q. You still haven't let the bids out to anybody? A. No, sir.

Q. Now, how long have you been getting the lumber of this kind that you described from the Winslow mill?

A. Well, we were getting it for quite some time but didn't detect—when lumber comes in from Winslow it's mingled with our lumber from Albuquerque and all other places, and we knew there was some trouble in our molding plant and we couldn't detect where it came from.

Q. When did you detect it?

(Testimony of Joseph Grevey.)

A. We detected it, I would say about six months ago it was definitely established that it's Winslow lumber.

Q. Just about six months ago? A. About.

Q. And yet you were going to replace the dry kiln before you detected it and knew where the trouble was?

A. I wanted to replace it because they were in very poor physical shape. [1093]

Q. You are getting now and have been since Duke City bought out the Winslow plant the same quality and kind of lumber that you were getting under the milling contract which had been in existence for over a year, isn't that right?

A. Under the milling contract we received very little of kiln dried lumber from Winslow.

Q. You, on your own, took it and dried it in Albuquerque, is that what you mean?

A. Yes, sir.

Q. You say that you have been to Winslow several times, both before this November 6th contract and you have mentioned at least once since, is that right? A. Yes, sir.

Q. And you say you observed the condition of the equipment and machinery? A. Yes, sir.

Q. Did you say it was obsolete and very poor?

A. Yes, sir.

Q. Do you have any opinion as to what that equipment was worth? A. No, sir.

Q. Have you purchased equipment?

A. Yes, sir.

(Testimony of Joseph Grevey.)

Q. New? A. Yes, sir. [1094]

Q. And used? A. No, sir; no, sir.

Q. How long have you been purchasing equipment for use in lumber mills?

A. I have been purchasing it for, I would say, over ten years.

Q. Well, this obsolete and very poor equipment that you saw there, what did that apply to, everything in the mill or just some of it?

A. I am limiting myself to the planing mill, the kilns, the burner, carriers and lift trucks.

Q. The saw mill is all right then, is that right?

A. No, I didn't say it's all right.

Q. Well, you didn't limit it to the saw mill anyway?

A. Because I don't know much about a saw mill.

Q. I see. But you do know about a planing mill?

A. Yes, sir.

Q. And you made some necessary repairs there?

A. Yes, sir.

Q. Your charged that off as expense?

A. I don't know, sir.

Q. Do you have any idea?

A. I have no idea, sir.

Q. Do you pay any attention to production costs? A. Very little. [1095]

Q. You have to make repairs from time to time to your good mill over in Albuquerque, don't you?

A. Yes, sir.

(Testimony of Joseph Grevey.)

Q. Now, do you know what a new planing mill costs of the kind and type that is at the Winslow plant? A. Of the type?

Q. Of that—the same kind or size, or however you may refer to it? Do you know what a new mill costs? A. I wouldn't know, sir.

Q. The planing mill?

A. I couldn't make a statement.

Q. Have you bought anything similar to that?

A. I have bought particular machines.

Q. How far gone was this when you say it's obsolete and in very poor condition, the planing mill I'm speaking of?

A. Well, we had breakdowns in the planing mill, we had breakdowns on account of the planers and especially one planer, we have also quite a bit of down time on account of the double end trimmer.

Q. Well, you apparently don't know what each of these individual items in the mill were worth in November, 1958, is that a fair statement, sir?

A. Yes, sir.

Q. But did you know in the aggregate what all of them were worth? [1096] A. No, sir.

Q. Well, at one time your brother was negotiating for the purchase of the entire mill for \$500,000, wasn't he? A. Yes, sir.

Q. And you understood that in that figure it included all of the machinery and equipment that finally was purchased? A. Yes, sir.

(Testimony of Joseph Grevey.)

Q. And in addition some 66 acres of land where the mill is located?

A. I wasn't aware of too much of what—of the land that went with it.

Q. And that that also included some 640-odd acres of land out in the forest?

A. I couldn't make a statement.

Q. You didn't know about that?

A. I didn't know about the land that went with the plant.

Q. Do you know about it now?

A. Now I know about it.

Q. Do you have any idea how much that land is worth? A. No, sir.

Q. Not the slightest? A. Not the slightest.

Q. Do you know that this contract provides in one paragraph that the forest land could be released upon payment of \$35,000 to apply on the purchase price? Do you remember that? [1097]

A. No, sir.

Q. Would you say that that planing mill was worth—of course you say it's worth less than a new one? A. Yes, sir.

Q. How much less? A. I wouldn't know.

Q. Is it worth half as much as a new one?

A. I wouldn't know, sir.

Q. A fourth? A. I wouldn't know, sir.

Mr. Moore: We object, if the Court please, the witness has said he doesn't know.

(Testimony of Joseph Grevey.)

Mr. Romley: That's what he has said, yes, your Honor.

The Court: He answered the question, Mr. Romley. He says he doesn't know.

Q. (By Mr. Romley): Have you seen this depreciation schedule which is Exhibit 11 in evidence?

A. No, sir.

Q. Now, who was the comptroller there before Tom Cavanaugh took the job?

A. Before Tom Cavanaugh took the job our comptroller was Mr. Buss.

Q. Did Mr. Buss prepare the schedule on which depreciation was to be figured on the machinery and equipment purchased?

A. I don't know, sir. [1098]

Q. Was there ever any discussion in your presence with regard to depreciation values on the newly-acquired machinery, equipment and buildings?

A. No, sir.

Q. Or over what period of time or over what production they should be spread?

A. No, sir.

Q. You don't know anything about that then, is that right?

A. That's right, I don't know anything about it, sir.

Q. In your opinion, sir, is the planing mill worth \$127,000?

A. I don't know, sir.

Q. Do you have any opinion at all?

A. No.

(Testimony of Joseph Grevey.)

Q. Would you give me the same answers if I asked you the same questions with regard to all of these other items that are shown that are being depreciated in connection with this purchase?

A. Yes, sir, I would give you the same answer.

Q. You just don't know and don't have any idea?

A. That's correct.

Q. Now, originally when you were present in Tom Gallagher's office it involved—that was in September, was it September 10th or 12th when you talked about the purchase?

A. Somewhere around that time. [1099]

Q. It wasn't at the time the letter was dictated?

A. No, sir.

Q. It was a day or two before that, or do you remember?

A. A day or two before I would say.

Q. Now, at that time do you remember any discussion about a first refusal agreement with Mrs. Nagel?

A. No, sir.

Q. At that time was your brother and were you negotiating for the purchase of all of the Gallagher-Kaplan properties, not only in Arizona but also in New Mexico?

A. Yes, sir.

Q. And were you contemplating negotiating, purchasing that alone?

A. Not to my knowledge.

Q. Well, who else was going to be in the deal with you?

A. Mr. Gallagher.

(Testimony of Joseph Grevey.)

Q. Well, then, you weren't talking about purchasing—or were you talking then about buying out Mr. Kaplan's interest?

A. We were talking this meeting about buying all the properties, at this particular meeting about all the properties jointly with Mr. Gallagher.

Q. And Mr. Gallagher refused to consider that proposal, is that right?

A. No, that wasn't this meeting. We learned about it later. He went to Phoenix, I guess, and came back and told us [1100] that he changed his mind, that he didn't want to enter this kind of negotiations.

Q. Well, didn't he tell you that on that same day, a day or two before September 12th when he dictated a—when the first rough draft of that letter of September 12th was dictated—

A. Wait, we are—after this meeting when we had—where we discussed buying jointly all the properties he left for Phoenix, when he came back we had another meeting.

Q. How long was he gone, or how long after the first meeting was it that you had the second?

A. It was a few days, one or two days, I don't recall exactly.

Q. Were you present at the two meetings with him? A. Yes, sir.

Q. Now, when he told you that he didn't care to go into that proposition did he say that he was willing to sell the Arizona part of the operation alone? A. Yes, sir.

(Testimony of Joseph Grevey.)

Q. At that time were you and your brother contemplating buying it alone for Duke City or with somebody else?

A. At that time we were contemplating buying it alone.

Q. And did you feel you had the financial resources to do it alone?

A. Well, it would be credit, of course, the terms would be credit. [1101]

Q. You didn't contemplate at that time, this is before that letter was written, that Mrs. Nagel was going to come in and help in the purchase, did you?

A. Of course not.

Q. It wasn't ever necessary that she come in and assist in that purchase, was it?

Mr. Moore: We object to that as calling for a conclusion as to whether it was necessary for her to come in to help in the purchase.

The Court: You mean financially?

Mr. Romley: Financially, yes, your Honor.

The Court: You ought to rephrase the question.

Q. (By Mr. Romley): Now, was Duke City able, on September 12th and September 18th and through the month of October, to purchase and handle financially alone the purchase of the Gallagher properties, meaning the Arizona operation?

A. We were able to handle it alone on credit.

Q. Now, are you familiar with these schedules that have been prepared answering certain of these interrogatories, Mr. Grevey?

A. No, sir.

(Testimony of Joseph Grevey.)

Q. Do you have an expense for a former partner that you charge against operation or production costs?

A. We are paying our former partner a monthly, he gets monthly payments. [1102]

Q. Who is that? A. Mr. Warren.

Q. How much do you pay him monthly?

A. He gets \$833.

Q. How long have you been paying him that?

A. This is since we parted, that was in January, '56.

Q. Or a little better than four years now?

A. That's correct.

Q. That comes to \$10,000 a year?

A. Well, whatever it comes.

Q. Does he perform any services for that?

A. No, sir.

Q. What is the payment for then?

A. It's a part of the agreement when we parted ways.

Q. Well, is it part—for purchasing his interest, you mean?

A. Well, I don't know how to phrase it, but in the agreement it was said that we had to pay him for five years at the rate of \$833 a month.

Q. And after the five years are gone what do you pay him? A. Nothing.

Q. Nothing. Was he a full partner at the time he left in January of '56? A. Yes, sir.

Q. Were there four partners at that [1103] time? A. Yes, sir.

(Testimony of Joseph Grevey.)

Q. What did he have, a 25 percent interest?

A. I guess 20.

Q. And I assume you paid him some in cash and agreed to pay him \$833.33 a month for five years, is that the situation?

A. I don't recall whether he got any cash, I wouldn't recall that. I remember the 833 because I sign every monthly check.

Q. I see. And that's in payment of his interest in the partnership you dissolved in January of—

Mr. Moore: We object to that as calling for a conclusion of the witness and an interpretation of an agreement which I understand is a written agreement.

The Court: He may answer if he knows what it's for.

A. There was a question about non-competition with us, with the—after he retires, parts, leaves the Duke City Lumber Company, the question that he wouldn't compete with us. And I think that those payments have something to do with that agreement of no competition.

Q. You think that but you are not sure?

A. That's right.

Q. And some of it has to do with paying for his interest in the old firm, I assume, is that right?

A. Not this money.

The Court: No, it would be better—if he [1104] doesn't know we'd better get the agreement.

(Testimony of Joseph Grevey.)

Q. (By Mr. Romley): Do you have a copy of that agreement here? A. I don't have it.

Mr. Romley: Is there one in the courtroom?

Mr. Moore: I do not know.

Q. (By Mr. Romley): In your opinion, Mr. Grevey, is this payment of \$833 a month to Mr. Warren a part of your cost of producing lumber at the Winslow plant?

Mr. Moore: We object to that, if your Honor please.

The Court: Objection sustained.

Mr. Romley: That's all.

Mr. Moore: Just two more questions, Mr. Grevey.

Redirect Examination

Q. (By Mr. Moore): Mr. Romley asked you about the September 12th proposal with Arizona Timber when Duke City was negotiating to buy it alone. Do you remember what the purchase price of the mill was in that proposal?

A. Yes, sir, it was \$500,000.

Q. And what was the purchase price of the mill in the contract when you did consummate it, do you know that? A. It was \$650,000.

Q. In the September 12th proposal, going back to the [1105] first one, there was reference to timber that had been in a pooling agreement. Under that proposal did you have to pay cash for that timber?

(Testimony of Joseph Grevey.)

A. At first there was a question about paying them cash for it. However, it was changed when Mr. Gallagher called in his brother, Bob, and Mr. Wickens to inform them that he is about to sell the property, and he told them that he is asking us to pay him cash for the lumber we received from the pool.

Q. Let me ask you this: After that, did you agree to pay it in timber or lumber?

A. We agreed to give them back in lumber.

Q. And on the final deal were you paying that off in lumber or did you pay it off in cash?

A. In the final deal there was credit extended.

Q. But you had to pay money for it instead of lumber?

A. Money for it, that's right.

Q. Do you remember how much that was without looking at the record?

A. Well, that made something—over \$300,000. Mr. Moore: That's all.

Recross Examination

Q. (By Mr. Romley): I'm not sure that I have this right, so I'm not trying to mislead you, sir. In September when you were talking to [1106] Mr. Gallagher, the price for the plant was to be \$500,000, is that right? A. Yes, sir.

Q. And the timber, this three hundred odd thousand dollars you mentioned, at that time was that to be paid in cash or on terms?

A. At that time it was in cash.

(Testimony of Joseph Grevey.)

Mr. Romley: I see. That's all. [1107]

Redirect Examination

Q. (By Mr. Moore): That was the first part of your negotiation with Mr. Gallagher?

A. Yes, sir.

Q. Before the negotiations closed, you changed it to lumber, is that right? A. Yes, sir.

Mr. Moore: That is all.

Mr. Romley: That is all.

(Witness excused.)

JOSEPH ROSENTHAL

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): State your name, please.

A. Joseph Rosenthal.

Q. Where do you live, Mr. Rosenthal?

A. New York City.

Q. What is your occupation or profession?

A. Certified Public Accountant. [1108]

Q. How long have you been a Certified Public Accountant? A. Almost forty years.

Q. All of that time in New York?

A. Yes, sir.

Q. Are you a member of any association of Certified Public Accountants?

(Testimony of Joseph Rosenthal.)

A. Member of the American Institute of Certified Public Accountants and the New York State Society of Certified Public Accountants.

Q. Have you had any experience, either personally or in your work with the lumber business?

A. My father was a lumberman, I remember, all the way back to 1910. I have represented companies in the lumber business.

Q. Other than Duke City, who have you done work for in the lumber business in this area?

A. Southwest Lumber Mills.

Q. Are you now doing work for Duke City Lumber Company? A. Yes, sir.

Q. Explain to the Court the type work you do for Duke City.

A. I act as their tax consultant and financial advisor.

Q. How long have you been employed by Duke City Lumber Company?

A. Since about the middle 1940's. [1109]

Q. Your name has been mentioned here several times, Mr. Rosenthal, about some conferences in New York City. Do you recall the date you met Mr. Liberman in New York City in the fall, October, 1958, and rather than be vague, I am leading up to the negotiations with the Gallaghers and Kaplans?

A. I do.

Q. When was that?

A. October 12th, 1958 in the evening on a Sunday.

Q. Where did you meet him?

(Testimony of Joseph Rosenthal.)

A. I met him at the airport.

Q. Were you present with Mr. Liberman in any of the negotiations with Mr. Kaplan or Mr. Gallagher or both of them? A. Yes, sir.

Q. When?

A. With Mr. Jack Kaplan on October 15 and in the evening, on the day of October 15, in the evening of October 15th and into the morning of the 16th with Mr. Jack Kaplan, Mr. Bob Gallagher and Mr. Tom Gallagher.

Q. And Mr. Liberman? A. Yes, sir.

Q. Were you in New York City all of the time from October 12th up until these negotiations started on the 15th? A. No, sir.

Q. What part of that time were you out of the city, do you recall? [1,110]

A. Yes, sir, on October 14th.

Q. You were out of New York City?

A. Yes, sir.

Q. On October 15th, Mr. Rosenthal, you have mentioned negotiations with Mr. Kaplan and these other people. Who did you meet with first?

A. Mr. Jack Kaplan.

Q. Where did that meeting occur?

A. In Mr. Liberman's room at the Essex House, New York City.

Q. Do you have any recollection as to how long that conference lasted?

A. Approximately, yes, sir.

Q. How long was it?

(Testimony of Joseph Rosenthal.)

A. It started in the morning somewhere I would judge around ten or ten-thirty, something like that, in that area, and lasted until I believe the afternoon, along about four or five o'clock, something in that area.

Q. That was just Mr. Kaplan, do I understand, as far as the sellers were concerned?

A. Yes, sir.

Q. Then you mentioned another meeting in the evening. Where did that meeting take place?

A. At Mr. Jack Kaplan's residence. [1,111]

Q. Do you have any recollection as to the approximate time when that meeting commenced?

A. I think approximately eight o'clock in the evening.

Q. And is that the meeting you mentioned Mr. Tom Gallagher and Bob Gallagher and Mr. Kaplan were all present?

A. Yes, sir.

Q. I assume that was the time when the serious negotiations were carried on?

A. Yes, sir.

Q. And that conference lasted until how long?

A. About two a.m.

Q. Now, Mr. Rosenthal, you have heard discussion here—you have been here in the courtroom during this trial, haven't you?

A. Yes, sir.

Q. And you have heard discussion here about this 14 million or 18 million feet of timber in the pooling agreement?

A. Yes, sir.

Q. Did you personally have any negotiations with Mr. Gallagher or Mr. Kaplan, either or both,

(Testimony of Joseph Rosenthal.)

with respect to whether that was to be paid in lumber or in money?

Mr. Romley: We object to that on the ground it is hearsay and immaterial.

The Court: No, he may answer.

A. Yes, sir, I did. [1,112]

Q. (By Mr. Moore): Briefly tell us what those negotiations were.

A. There was discussion as to the price to be paid for the timber. There was not much discussion about that, that had been more or less settled. If there was to be a deal would be \$17, but there was discussion of the manner in which it would be paid. Since that lumber had already been consumed Mr. Kaplan felt that at least that amount should be paid for in cash. And we couldn't help but agree with him that he was right. However, I personally had a meeting with Mr. Kaplan at which Mr. Liberman—

Mr. Romley: Your Honor, I don't know whether my objection was sufficiently broad, as to an earlier question. I again urge this as hearsay.

The Court: It may show as a continuing objection.

Q. (By Mr. Moore): Just briefly proceed.

A. I personally arranged with Mr. Kaplan that the payment for that amount would be on an extended basis on credit for three years. And Mr. Kaplan asked me if I felt satisfied it would be paid and I assured him it would.

(Testimony of Joseph Rosenthal.)

Q. That was the negotiations with respect to the lumber versus money or money versus lumber?

A. Yes, sir. In effect it was a payment over an extended period of time for money that would have been owed at that time. [1,113]

Q. After the conference adjourned, you say about two o'clock in the morning, where did you go?

A. Directly to the Essex House.

Q. With Mr. Liberman? A. Yes, sir.

Q. Prior to that time had you had any discussion or had Mr. Liberman mentioned to you this September 23rd letter agreement with the Nagels?

A. I don't recall any mention of that prior to October 12th. We may have or may not have, I am not sure.

Q. I meant prior to October 16th at two o'clock in the morning had he discussed it with you?

A. Yes, sir.

Q. Did you stay with Mr. Liberman that night in his room at the Essex House? A. I did, sir.

Q. On the morning of the 16th of October, 1958, were you present when Mr. Liberman placed a telephone call to his brother Joe Grevey that Mr. Grevey testified about? A. Yes, sir.

Q. Did you hear Mr. Liberman's discussion, his part of that conversation? A. Yes, sir.

Q. Was that in substance as Mr. Grevey recited it?

Mr. Romley: We object to that as a conclusion and hearsay. [1,114]

(Testimony of Joseph Rosenthal.)

Q. (By Mr. Moore): I was trying to save time. What did you hear Mr. Liberman say?

Mr. Romley: I still object on hearsay.

Mr. Moore: I think this goes to the state of mind that we discussed a moment ago, is what he heard Mr. Liberman in substance say to Mr. Grevey in that telephone call.

The Court: Well, limit it to that and what Mr. Liberman was going to do.

Q. (By Mr. Moore): Let me ask a leading question to save time. Did you hear Mr. Liberman report to Mr. Grevey in substance the terms of the deal that they had negotiated up to two o'clock on the morning of the 16th? A. Yes, sir.

Q. And did you hear Mr. Liberman say anything to Mr. Grevey about telephoning Mrs. Nagel?

A. Yes, sir.

Q. Now, did you remain in Mr. Liberman's room then? A. Yes, sir.

Q. Did you hear Mr. Liberman place a call to Mrs. Nagel at Winslow, Arizona?

A. Yes, sir.

Q. Approximately what time was that call placed?

A. Approximately nine o'clock a.m. New York time.

Q. Was the call completed? [1,115]

A. Yes, sir.

Q. Now, tell us, Mr. Rosenthal, as best you can remember the substance of what you heard Mr. Liberman say to Mrs. Nagel in that telephone call.

(Testimony of Joseph Rosenthal.)

A. He told Mrs. Nagel—first he apologized for calling her so early in the morning. He told her that we had spent the entire evening and up until early in the morning with Mr. Kaplan and the Gallaghers trying to negotiate the terms of an agreement; he had arranged with them we were to meet again at eleven o'clock in the morning to let them know whether or not a deal would be consummated. There had been an understanding, as he told her, he told her there had been an understanding that neither side was bound by what had been discussed the night before; the purpose of getting together at eleven o'clock would be for the both parties to decide whether or not they were willing to agree, either having the right to back out at that time. He told her that Tom Gallagher wanted to buy the properties himself and that in order to consummate the deal the price was jacked up from \$500,000 to \$650,000 for the plant; that the price of the timber was \$17 a thousand. He asked her if she wanted to participate. He practically pleaded with her to come in to participate.

Mr. Romley: I object to the conclusion, your Honor. I think we should have the words. [1,116]

A. In essence he said, "I want you to come into this deal with me because it is a very big undertaking and I don't want to undertake it myself, I want you to participate with me." He then told her that he was sorry that she wasn't going to participate with him and in view of the fact that he

(Testimony of Joseph Rosenthal.)

had to make some financial commitments he would appreciate it if she would send him a wire releasing him from the option and also the seven-year agreement in the deal.

Q. (By Mr. Moore): After Mr. Liberman hung up the telephone, did you say anything to Mr. Liberman about him having left out a part of the transaction in his discussion with Mrs. Nagel?

A. I did, sir.

Q. What did you say about that to Mr. Liberman?

A. I said, "Maurice, since," I said, "Maurice, didn't you forget to tell her one of the very important things that you should have told her?" He said, "What?" I'm sorry—

Q. Just what you said to him.

A. I am sorry. I was thinking for a moment because I was wondering what I could say now, not thinking what had been said. I said, "Maurice, I think you should have told her what the terms were, that it was all credit and not cash, that might make a difference to her as to whether or not she wants to come in." He said, "Did I forget that?" I'm sorry, again I said what he said. [1,117]

Q. What did he do after you said that to him?

A. He immediately placed another call to Mrs. Nagel.

Q. At Winslow? A. At Winslow.

Q. Were you present in the room when that call was completed? A. I was.

(Testimony of Joseph Rosenthal.)

Q. Did you hear what Mr. Liberman said to Mrs. Nagel in the second call? A. I did.

Q. Tell us in substance what you heard Mr. Liberman say in the second call.

A. He said, "Mrs. Nagel, my accountant Joe Rosenthal is sitting here with me and he told me that I forgot to tell you what the terms of the deal were, that it was all credit and not cash and did not require anything as payment. I hope that will make you change your mind." Again he repeated what he said in the earlier conversation about wanting her to come in and after the discussion continued again he said, "Since you are not coming in will you please send me the wire—" incidentally, he had asked her if she had already sent the wire and again he said, "Will you please send me the wire."

Q. After the second call to Mrs. Nagel did you hear Mr. Liberman place a call to his brother Joseph Grevey in Albuquerque? [1,118]

A. Yes, sir.

Q. Did you hear Mr. Liberman's part of that conversation? A. Yes, sir.

Q. Did he report to his brother that he had talked to Mrs. Liberman—excuse me—to Mrs. Nagel? A. Yes, sir.

Q. Did he report to his brother that Mrs. Nagel had reported to him that she did not want to participate in it? A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Did he and his brother have some lengthy discussion about the matter? A. Yes, sir.

Q. Did you hear him say anything to his brother about directing Mr. Buss, the comptroller, to go to the bank in Albuquerque that day?

A. Yes, sir.

Q. What did Mr. Liberman say to his brother about that?

A. He told him to go to the bank and arrange for a line of credit.

Q. Do you remember the amount or was the amount mentioned?

A. I don't recall. I recall clearly his telling him to go to the bank to arrange for a line of credit; I don't know whether an amount was or was not mentioned, if so, what.

Q. After that call was completed, Mr. Rosenthal, do you [1,119] recall whether or not Mr. Gallagher and Mr. Cavanaugh came over to the Essex House?

A. Yes, sir.

Q. Do you recall approximately what time that was?

A. Either at eleven o'clock or shortly thereafter.

Q. First did Mr. Gallagher and Mr. Cavanaugh meet with Mr. Liberman?

A. At what time, Mr. Moore?

Q. At this eleven o'clock meeting.

A. Yes, sir.

Q. Were you present? A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Was there any further negotiation or discussion about the transaction they had been negotiating?

A. Just an agreement they would make the agreement on the basis of the negotiations conducted the previous evening and from then on it was merely a matter of implementing.

Q. Did Mr. Cavanaugh remain there?

A. Yes, sir.

Q. You heard Mr. Cavanaugh say the three of you had lunch together?

A. Yes, sir, Mr. Liberman, Mr. Cavanaugh and myself.

Q. Approximately what time did you have lunch, do you know?

A. It was during the noon hour, somewhere between twelve [1,120] and one is when we started.

Q. Mr. Gallagher returned to his lawyer's office, as far as you know?

A. As far as I know, yes.

Q. Do you recall about what time you finished lunch?

A. Somewhere around one-thirty or two o'clock.

Q. The three of you then started back to Mr. Liberman's room or where did you start to go?

A. We had intended to go back to the room.

Q. What happened at that time with respect to a telegram? I want to limit this to details.

A. Mr. Liberman received a telegram. My recollection is not clear whether he received it down-

(Testimony of Joseph Rosenthal.)

stairs at the desk or had a note at the desk downstairs and went upstairs to get it, but I know there was a telegram there when we finished lunch.

Q. Did you see that telegram?

A. Yes, sir.

Q. Did you read it? A. Yes, sir.

Q. And that is the same telegram we have had in evidence and heard us talk about and heard us read? A. Yes, sir.

Q. After receipt of the telegram what did Mr. Liberman do? [1,121]

A. He tried to call Mrs. Nagel at Winslow.

Q. Where from?

A. His room at the Essex House.

Q. Who was present at that time?

A. I was.

Q. Mr. Cavanaugh was not present?

A. That is correct, sir.

Q. Was Mr. Liberman able to complete the call when it was placed? A. No, sir.

Q. After lunch, as you have told us about?

A. No, sir.

Q. Was the call completed later that day?

A. Yes, sir.

Q. Where was Mr. Liberman when he completed the call? A. In his room.

Q. Were you present? A. Yes, sir.

Q. At approximately what time was that New York time?

(Testimony of Joseph Rosenthal.)

A. Somewhere around the five o'clock hour, a little before or after, but in that range.

Q. Did you hear Mr. Liberman's part of that conversation when that third call was completed to Mrs. Nagel? A. Yes, sir.

Q. Tell us in substance, Mr. Rosenthal, what you heard [1,122] Mr. Liberman say to Mrs. Nagel.

A. He said he was surprised to receive the wire in the language he got it in view of the earlier conversation and he told her he had already made the commitment with the Gallagher group for the purchase and said something about: This may not be the same deal we had under the option, this may be a new deal, but it doesn't make any difference whether this is a new deal or the old deal, I am not trying to keep you out, I am trying to encourage you to come into the deal. He again asked her if she wouldn't come into the deal. Then he said something about he would give her an additional 48 hours to make up her mind whether she wants to participate.

Q. Did you remain there at the hotel that evening? A. No, sir.

Q. You went home? A. Yes, sir.

Q. You live where?

A. In Hollis Park Gardens, which is approximately 15 miles from New York City.

The Court: We will take the afternoon recess at this time.

(Recess.) [1,123]

(Testimony of Joseph Rosenthal.)

After recess:

Q. Mr. Rosenthal, were you present in New York when the memorandum of agreement was finally presented and initialed by the parties?

A. Yes, sir.

Q. Do you recall what date that was?

A. That was Saturday, October the 18th.

Q. And then were you also present in Albuquerque when there were additional negotiations and the contract that's in evidence was finally prepared?

A. I came in at the very tail end.

Q. Of the negotiations on that?

A. Yes, sir.

Q. Now, Mr. Rosenthal, you have been in the courtroom all of the time during this trial with us, haven't you? A. Yes, sir.

Q. I wish you would define for us the term "depreciation."

A. Depreciation is a means of spreading among various accounting periods the cost of an asset which should not be charged to expense during the particular accounting period in which it is acquired.

Speaking in terms of years, for example, if an asset is acquired in A year and the asset has a five-year life, you would spread the cost of that asset over the five years and that's one method of computing depreciation. [1,124]

Q. Now, is there another method that is used in the lumber business?

(Testimony of Joseph Rosenthal.)

A. Yes, there are many methods that are used in various businesses, but the methods that are most applicable to the lumber business, and in this particular case as the exhibits have been presented, is the time method, the method I have just explained and the other is the unit of production method.

By that I mean that the known factor is the cost of the asset which should be spread over a particular life. The life or the determination of the life is a matter which requires judgment, the judgment of the individual who is making the computation. The proper method to do that is to determine, to the best of one's ability, the reasonable number of units which may be expected to be produced by that piece of equipment, or processed if that's the nature of the operation, and then to spread the entire cost of the asset over the number of units which may reasonably be expected to be produced, so that the depreciation charges will fall in those periods in which the unit is produced or processed.

Q. Now, Mr. Rosenthal, did you, at my request, meet with Mr. Nelson who has been on the stand earlier, and look at the depreciation ledger of Nagel Lumber & Timber Company?

A. Yes, sir, it's called an equipment ledger.

Q. An equipment ledger. And from that ledger did you take certain information and prepare it in the form of what I [1,125] will refer to as a schedule?

A. I did, sir.

(Testimony of Joseph Rosenthal.)

Mr. Romley: If the Court please I have an extra copy of this if it would be of assistance to you while the witness is using the exhibit.

(Defendants' Exhibit O marked for identification.)

Q. (By Mr. Moore): Mr. Rosenthal, the Clerk has handed to you Defendants' Exhibit O for identification. Will you explain that exhibit for us, how it is depreciated and the basis, first on the unit method that appeared in the Nagel Equipment Depreciation Ledger?

A. I examined the equipment ledger and I extracted typical assets on which depreciation was computed by the Nagels. I segregated those assets into the two categories I described, those that were depreciated on the unit of production method and those which I call annual rate, that's the type that I referred to before as having a or being depreciated over a period of time.

As to the items in the unit of production method, I took them from various places in the ledger taking the different items, the resaw, the new boiler house and the steel tank fuel house and carrier trimmer. That's part of the saw mill, part of the planing mill, and I took a thing like dry solder, that which is another term for kiln, or part of the kiln, and concrete base for dry solder. The concrete base for [1,126] dry solder obviously can last almost indefinitely. All of these assets which are listed in that section called unit of production method

(Testimony of Joseph Rosenthal.)

I showed the year when they were acquired, the original cost as reflected on the books and a notation which appeared on the ledger, "Timber under contract," showing the number of feet under contract at the time the asset was acquired and the amount of timber under contract at the time the asset was acquired is the period of time or the number of units during which the asset was depreciated.

Q. Now, the time method, is that shown from various items that you selected under the title at the bottom of that page, "Annual rate"?

A. Yes, sir, I did the same thing for those assets which were depreciated on the basis of time, and I showed the nature of the asset, the year it was acquired, the cost and the number of years over which it is to be depreciated.

I might state, incidentally, that broadly speaking, the movable equipment, that which can be moved away if the plant is completely finished, has been depreciated on the basis of time. Those assets which are fixed and which have relatively little value or are not easily—would not be easily movable when the plant is finished with its operation, those assets were depreciated on the unit of production method.

Both of those methods are logical and normal, accepted accounting practice. [1,127]

Q. And from what you observed there and what you have heard from Mr. Cavanaugh's testimony, and others with respect to the depreciation sched-

(Testimony of Joseph Rosenthal.)

ule which Mr. Romley was asking about, does it appear that both companies are using the identical method of depreciation?

A. With one single exception, Mr. Moore, yes.

Q. And what is that exception?

A. They both start off depreciating where they use the unit of production method, they both start off depreciating on the basis of timber under contract at the time the asset is acquired. The Nagel Company, having once established such a rate, continues that rate per unit even though it acquires an additional sale of timber. The Duke City Company does not, when it acquires an additional amount of timber it extends the life of the asset to cover the additional units to be produced.

Mr. Moore: We offer in evidence Defendants' Exhibit O for identification.

Mr. Romley: We have no objection.

The Court: It may be received.

(Defendants' Exhibit O received in evidence.)

Q. Now, Mr. Rosenthal, directing your attention—first, let me ask you this: Did you examine copies of Plaintiffs' Exhibits 7-A to 7-I inclusive, being the annual reports which have been introduced in evidence, the reports of the Nagel [1,128] Company? A. Yes, sir.

Q. Did you also, at my request, examine copies of Plaintiffs' Exhibits 10, 11, 12 and 13?

A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. At my request did you prepare an analysis and adjustment of computations shown in Plaintiffs' Exhibit 10? A. I did.

Q. And did you use, as a basis for that, the years 1955 through 1959? A. Yes, sir.

Q. Also in addition to what appears in the annual reports heretofore mentioned, did you extend back of September 30th, 1957, compensation to the partner— A. I did.

Q. —who was working? A. Yes, sir.

Q. And for the years '57, '58 and '59 did you take the exact figure from those exhibits covering those years to show the compensation on this analysis drawn by the partners who were working?

A. Yes, Mr. Moore, but the year '57 I started with October 1st, 1957, because that is when the partners' salary was set up on the books for the first time as an expense.

Q. And based on those adjustments, did you calculate an operating profit spread over a given number of feet of timber for a five-year period, 1955 to '59?

A. I did, but before doing that I made one additional adjustment, Mr. Moore.

Q. What adjustment did you make?

A. I reduced the operating profit shown on Exhibit 10 by interest and bad debts shown on these reports during the respective periods.

Q. And also with respect to Plaintiffs' Exhibit 12 did you, at my request, assume in the preparation of that analysis and computation, in line with

(Testimony of Joseph Rosenthal.)

a part of the plaintiffs' theory in the lawsuit, that the milling contract either would have been renewed or another one negotiated on the same terms?

A. I did.

Q. And did you, in the preparation of that analysis, project that over a total production of a given number of feet of lumber? A. Yes, sir.

Q. And you took that production from their exhibit that was shown for a period of five years?

A. Yes, sir.

Q. And calculated that with the deduction of what would have been milled under the milling contract which was taken care of in a separate item, is that the way you did that?

A. Yes, sir. [1,130]

Q. And also did you make an adjustment of that exhibit, Plaintiffs' Exhibit 12 for depreciation?

A. Yes, sir.

Q. From that then did you extend and calculate a projected profit for those five years?

A. Yes, sir.

Q. And on that did you also include in your calculations interest at the rate of 6 percent on a capital investment of \$650,000? A. I did, sir.

Q. And also on the investment for timber?

A. Yes, sir.

Q. And did you also include 6 percent interest on working capital of \$500,000? A. Yes, sir.

Q. And then you made calculations with respect to the applicability of the interest to various items on that exhibit, is that correct? A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Then from what you had prepared with respect to those exhibits, did you project profits in an analysis of the computations shown on Plaintiffs' Exhibit 9 through 13?

A. I don't quite understand that last question.

Q. Or 10 through 13? I don't understand it myself.

After you had calculated from those exhibits on the [1,131] basis that I have outlined to you, did you then arrive at a figure which, from that analysis, would indicate the operating profit for the Nagels' reports and with the interests applied to the principal investment and working capital that Mr. Cavanaugh talked about this morning, for a period of five years? A. Yes, sir.

Q. From that did you deduct a discount for risk and hazard? A. Yes, sir.

Q. And that figure was supplied to you by someone else? A. Yes, sir.

Q. And from that then did you project the profit after provision for risk and hazard?

A. Yes, sir.

Q. And then determined the present value of that sum of money on the 4 percent discount table?

A. Yes, sir.

(Defendants' Exhibit P marked for identification.)

Q. (By Mr. Moore): Now, Mr. Rosenthal, the Clerk has handed to you Defendants' Exhibit P

(Testimony of Joseph Rosenthal.)

for identification, consisting of five pages. Is that the analysis and adjustment of the computations which I was just asking you about?

A. Yes, sir.

Q. Now, where did you get the figures from which the total [1,132] appears under the title "Operating profit of Nagel mill before deducting depreciation for five years, 1955 to '59"?

A. Plaintiffs' Exhibit 10.

Mr. Romley: I'm sorry, I didn't get that answer.

A. Plaintiffs' Exhibit 10.

Mr. Romley: Thank you.

Q. (By Mr. Moore): That represents the total shown on Plaintiffs' Exhibit 10 for the years '55, would that include the year ending—

A. It covered the five years, 1955 through 1959, the last five years shown on Plaintiffs' Exhibit 10.

Q. Where did you get the figures listed under interest and bad debts opposite 1955, '56, '57, '58 and '59?

A. From Plaintiffs' Exhibits, I don't know the numbers, those annual reports. Each year is a separate report except for the year 1957 which is the two reports, part up to September 30th and the remainder the balance of the year.

Q. Where did you get the information or how did you arrive at the figures under additional salaries, 1/1/55 to 9/30/57?

A. If we may start first please, Mr. Moore, with the lower item, the partners' compensation as shown on the annual report beginning October 1st, 1957.

(Testimony of Joseph Rosenthal.)

That information I obtained the first column from the reports themselves, the second column are the amounts shown in Plaintiffs' Exhibit 10 which is that \$27,000 per annum discussed as a management fee, and the portion [1,133] of the year 1957, the one-fourth of the year is \$6,750, the additional, of course, is the excess of the amount shown in the annual reports over the amount allowed in Plaintiffs' Exhibit 10.

For the year 1955, 1956 and the first nine months of 1957 no allowance had been made on the Plaintiffs' Exhibit 10 for management. The reports themselves contained no allowance for partners' salaries. At that time Mr. Jenkins was an employee and his salary was treated as ordinary salary, the same as any other employee. His salary in the period after that, incidentally, is included in the amount of partners' salaries. Therefore, for the period prior to September 30th, 1957, the only salary which has not been provided for was that of Mrs. Nagel. I took, for this purpose, the same salary per annum as per beginning salary as reflected on the report for the period beginning October 1st, 1957, which incidentally was \$30,000 per annum.

Q. Now, then, the operating profit as adjusted before depreciation, that is the figure shown—the total figure shown is opposite what I have read?

A. Yes, sir, that's the \$815,713.97 is the profit as shown on Plaintiffs' Exhibit 10 reduced by the interest, bad debts and additional compensation.

(Testimony of Joseph Rosenthal.)

Q. Then to arrive at a figure per thousand as indicated at the bottom of the first page of Defendants' Exhibit P where [1,134] did you get the figure 104,591,000 feet?

A. That's the footage for the last five years on that Exhibit 10, the same five years that I used for the profits.

Q. Simply a mathematical calculation to arrive at the figure per thousand shown opposite what we were just discussing?

A. Yes, sir.

Q. Now, let's look at the second page. First, where did you get the figure 150,000,000 of lumber at the top of that page?

A. I took your instructions on that, Mr. Moore.

Q. Of 30,000,000 feet per year for five years?

A. Yes, sir, those are the 30,000,000 feet which are shown on Plaintiffs' Exhibit 13, I believe it is, which indicates the total expected production during each of the years, and there is a small difference in one of the years, I forget what it was, but that small difference is relatively immaterial.

Q. And the next item, net depreciable balance, where did you get that figure?

A. From Plaintiffs' Exhibit 11.

Q. Now, will you explain the next paragraph below that?

A. Yes, sir. I made provision for additional fixed assets to be acquired during the five year period in which it is contemplated that 30,000,000 feet of lumber per annum would be produced. The figure of \$100,000— [1,135]

(Testimony of Joseph Rosenthal.)

Mr. Romley: Just a moment.

The Witness: I'm sorry.

Mr. Romley: Your Honor, I don't like to interrupt but if he could confine himself to what it is without getting into figures, because if he is going to refer to figures based on hearsay, of course, I would make an objection. I think he can explain what these are without giving the figures. [1,136] I object on that ground.

The Court: He may go ahead. All of this is, in the last analysis, what it is worth and without analyzing the merit of what he has done.

Mr. Moore: Proceed, Mr. Rosenthal.

A. May I start back at the top?

I started with a net depreciable balance as shows on Plaintiffs' Exhibit 11, which covered the depreciation on the assets acquired in the purchase from Gallagher.

Q. (By Mr. Moore): That is the purchase made by Duke City? A. That is correct.

Q. That is a figure which they took from Duke City's depreciation schedule? A. Yes, sir.

Q. Very well.

A. To that I added provision for normal additions and replacements which were not shown on Plaintiffs' Exhibit 11, of the type that were referred to in the testimony by various witnesses earlier in this case, and put a figure of \$100,000 in that category. That too is to be depreciated over

(Testimony of Joseph Rosenthal.)

this five year period which is the pattern throughout here. Then I provided for depreciation on the rolling equipment on the basis of two years at \$50,000 per annum. The amount was arrived at after discussion with you, Mr. Moore; that the [1,137] additional equipment which had been provided for on Plaintiffs' Exhibit 11 of just a little under \$150,000 at the end of three years, I took Plaintiffs' assumption that the existing assets would be fully depreciated and out of use at the end of three years and at the end of a three year period, which is still within the framework of these five years I am working on, that there would be a replacement of that equipment. I assumed, as was testified, that the cost of replacing that equipment new would be over some \$300,000, which after providing for five per cent salvage would still leave a depreciable cost of \$300,000. Since this equipment, and taking a five year life, would be at least \$60,000 per annum—and incidentally, the five year life is the maximum that Nagel took on the depreciation schedule that I referred to before. Their actual depreciation, I believe, is even shorter than that. But taking a five year life of \$300,000 would give \$60,000 per annum. To be on the safe side I took \$50,000 per annum for those two years, without making provision for the additional loss

(Testimony of Joseph Rosenthal.)

which might be encountered, if at the end of five years they had equipment only two years which had cost over \$300,000, they certainly, in the ordinary course of events, could not realize the depreciated book value. But I took this \$50,000 with that thought in mind principally as the base for that deduction. Then I added these additional depreciation amounts which would have to be provided for [1,138] during the first five year period onto the amount shown on Plaintiffs' Exhibit 11 and came up with the total depreciation and spread that over a total projected production of 150 million feet of lumber and the rest of 516 is a mathematical calculation.

Q. Go to the next page. The one I have is marked Page 1.

A. That is correct. There are two pages. Page 2 is the supporting schedule.

Q. Can you explain, Mr. Rosenthal, the computations that you made on the third page, which is marked page 1, to indicate one of two pages, of the analysis of adjustment of computation on Plaintiffs' Exhibit 12? And let me again warn you that you are using figures and it is difficult I think for the reporter to get the figures, if you can slow down it will help him I am sure.

A. Thank you, Mr. Moore.

Here again I made my projection based on production of 30 million feet of lumber during each of the five years, 1959 to 1963, which are the first

(Testimony of Joseph Rosenthal.)

five years shown on Plaintiffs' Exhibit 13. I divided the computations into two categories and I tried to follow the format of the plaintiffs' exhibit as closely as possible so as to make the proper comparison. The language is not necessarily the language I would have used if I were preparing it all originally, but I tried to follow it. [1,139]

The first item is the Duke City Aztec, which referred to the \$3 per thousand charge for milling. On Plaintiffs' Exhibit 12 they referred to 50,663,000 feet to be milled at a charge of \$3 per thousand. The gross income therefore for that charge would be \$151,989 during the remaining life of that contract, or if not a contract an arrangement similar to it. I then made provision for the interest, which is applicable to the charges in connection with the milling contract, for which plaintiff made no provision on its Exhibit 12. And with your permission, Mr. Moore, I would like to reserve the explanation of the interest until we get to the next page.

Q. I think that probably would be helpful. Proceed.

A. I arrived then at a total profit on the charges for milling by taking the total income from milling minus the applicable interest and determined a total profit of \$89,058 on the \$3 item. I then approached the charge for depreciation of \$4.33. But I made provision for the applicable depreciation, which was a proper charge against this income and was not provided for on Plaintiffs' Exhibit 12,

(Testimony of Joseph Rosenthal.)

and that is shown on the computation which I made on the preceding page of \$5.16 per thousand feet. Since the total production through that mill during the five years would be 150 million feet, part of the timber being under the milling contract and part of the timber being what has been referred [1,140] to by the plaintiffs as "balance of available lumber" and since the total depreciation was spread over the entire 150 million feet of lumber, obviously the lumber which is milled under the milling contract must be charged with depreciation in the same manner as the balance of the available lumber. The computation of depreciation that I have made comes to \$5.16 per thousand, leaving a net loss on depreciation of 83 cents per thousand, which when multiplied by the 50 million some odd feet to be milled, resulted in a loss on depreciation of \$42,050.

Q. At this stage, Mr. Rosenthal, let me ask you, did you make these calculations with a slide rule or how did you do it?

A. Mr. Moore, I did it the hard way.

Q. You mentioned a slide rule to me once, it might vary a few pennies; I didn't know whether you corrected it.

Title 2 on that page is entitled: Balance of available timber.

A. Lumber, Mr. Moore.

Q. Excuse me, lumber.

A. Shall I proceed?

(Testimony of Joseph Rosenthal.)

Q. Proceed, please.

A. We start with the total projected lumber production of 150 million feet. I then excluded the footage which was to be milled under item 1 at the top of the page of 50 some [1,141] odd million feet and determine that the balance of lumber production would be 99,337,000 feet, and this, incidentally, is the same formula that plaintiff used in its exhibit, except that I stopped at the end of five years. I then summarized the profit per thousand before depreciation which appeared on my first page of these exhibits, which is \$7.79 per thousand, subtracted the depreciation per thousand which appeared on the second page of my computations of \$5.16 per thousand and came up with a profit after depreciation and after the other adjustments I referred to of \$2.63 per thousand, which when multiplied by the 99 million some odd feet, comes to 261,256 dollars as being the total projected profit on the balance of available lumber. From that I deducted the interest applicable to the balance of this available lumber or timber which had not been provided for on Plaintiffs' Exhibit 12, and which again with your permission I would like to explain when I explain the interest on the next page, of \$149,659, and arrived at a projected profit on the production and sale—and I want to emphasis sale, because these figures are all based on production and sale, of the balance of available lumber of \$111,597.

(Testimony of Joseph Rosenthal.)

Q. That is the balance of available lumber exclusive on this exhibit of the 50 million feet that was set up in Plaintiffs' Exhibit 12?

A. That is right. Assuming the total production of [1,142] lumber would be 150 million feet, if 50 some odd million feet would be milled under the milling contract that would leave available approximately one million feet for the balance of available lumber. Then by adding the numbers together I arrived at a total projected profit on the milling charges plus the projected profit on production and sale of available lumber in the amount of \$158,605, and then by mathematical computation fifty per cent is \$79,303.

Q. Will you proceed to the next page, which is marked in the right-hand corner page 2, and explain that, please?

A. Yes, sir. This page explains my computation of interest on the capital required to finance the two different types of operations, the milling operation and the timber, which will be in the mill other than the Duke City lumber to be milled. And I made provision for interest at six per cent per annum on those amounts which would be tied up respectively in each operation. The first operation—I am sorry. First I showed the total interest expense during the five year period on an overall basis. I then subtracted the interest which was applicable to the milling charge and said the remainder of the interest is applicable to the remainder of the operation.

(Testimony of Joseph Rosenthal.)

Starting up at the top. The total interest expense during the five year period consists of interest on three specific items. First there is the interest on the \$650,000, [1,143] which is the purchase price of the plant. Since that price was payable monthly on the balance of principal and there would be a reducing amount of interest, I provided for the total amount of interest which would be paid during this five year period on the reduced balances at six per cent per annum. That comes to \$97,500, which is equal to 65 cents per thousand feet.

Then Item B I provided for interest on the \$405,000 some odd amount, which was the purchase price of the timber right. That includes that 18 million some odd feet which has been the subject of a good deal of discussion. But I set this up in the same manner that the plaintiff set it up in its exhibit, it being assumed those timber rights would belong to the plaintiff, I made provision for them in the earlier computations at your request, Mr. Moore, as though they belonged to the plaintiff. But if they are to be computed that way then obviously the interest should be charged against that operation. Thereto I did the same thing as I did in the earlier amount. Since that interest is payable monthly on a balance of principal during three years, I did not compute interest on the total amount for that period, but on a sliding scale, based on the actual amount which would be payable; that comes to \$36,476. Incidentally, I computed these amounts as though the payments would have

(Testimony of Joseph Rosenthal.)

been made when due without making any adjustment for prepayments by the Duke [1,144] City Lumber Company. This is what would have been paid had the contract been carried out as drawn.

Then in Item C I provided for a minimum working capital of \$500,000 and made provision for six per cent per annum on that, which would have been \$30,000 a year. But here I took it for the entire five years because that amount would be required during the entire five years. Those three items of interest added together come to \$283,976.

The next item, D, to take care or to give effect to the interest which I showed in an earlier computation in the determination of the Nagels' profits, since their operations were comparatively similar and at least they are used as a basis for my computations; the Nagel computations provided for \$71,386 of interest. To make this thing comparable and equitable I subtracted this amount of interest which I provided for in an earlier computation and said that the balance or remainder of the interest over and above the Nagel interest, which would be applicable to this five year period, comes to \$212,590. Having determined that that is the total interest above the Nagel interest which would be required during this five year period I then computed what portion of the interest is applicable to the charges for milling, because I wanted to show the profit on the milling contract separate from the profit on the remainder of the [1,145] timber.

(Testimony of Joseph Rosenthal.)

Q. Was that also because it was set up that way on Plaintiffs' Exhibit 12, I mean this profit on the milling contract was set up separate?

A. That is correct, Mr. Moore.

Q. Okay.

A. The interest applicable to the charges for milling. (A) on the purchase price of the plant we computed up above that the interest charge is 65 cents per thousand dollars spread over a five year period.

Q. Per thousand dollars?

A. Per thousand feet, I am sorry. Here I didn't know which to do. Since the milling contract was for 15 million feet and the total quantity—per annum—and the total quantity for 15 million feet, if it were run out as quickly as that, it would run out in three and two-thirds years, not in five years. In that case the interest would be higher than in the earlier period than the average throughout the entire five years, because it starts at a high interest rate, goes down to a low interest rate. However, I had to make a decision and I decided that I would take the average rate per thousand even though the actual rate is a little higher. And I multiplied out the 50 some odd million feet at 65 cents per thousand and determined \$32,931 of interest would be applicable to the gross income from the milling contract. That is the figure that is referred to on the previous page—I'm [1,146] sorry, I am not quite ready for that.

(Testimony of Joseph Rosenthal.)

Item B under that section. The milling contract required Gallagher to finance the Duke City inventory. That has been testified to earlier in this case, and I took for this figure an average inventory of \$150,000, which is less than what has been testified to. This computed at six per cent per annum, and computed for three and one-third years, which would be the shortest period during which the milling contract would be run out, comes to \$30,000. That three and one-third years is arrived at by taking 15 million feet a year, three years would be 45 million feet and an additional one-third of a year would be 5 million feet. That is how I arrived at the three and one-third years. If the milling contract were to run for a five year period spread out evenly, then the interest would have been more than this, but again I had to make a decision and if we put more interest in one place, we put less interest in the other place. So it doesn't make much difference if you apply the interest to one or the other, the total has to be applied. However, in that way I did arrive at the interest applicable to the milling charges of \$62,931, which is what I showed on the preceding page, and the remainder of the interest is applicable to the remainder of the operation, which I applied correspondingly on the previous page.

Q. The last page, Mr. Rosenthal: Deduct discount for [1,147] risk and hazard. Did you calculate that figure?

(Testimony of Joseph Rosenthal.)

A. Just arithmetically.

Q. Assuming that in order to arrive at the present value for the prospective profits, or assuming that to determine market value of timber cutting contracts that a discount factor was, I believe 58 per cent, is reasonable, then is that calculation correct? A. Yes, sir.

Q. And the remaining part of it is simply copying of Plaintiffs' Exhibit 13 showing five years at four per cent interest? A. Yes, sir.

Q. The third page, Mr. Rosenthal, under paragraph 2. A. Yes, sir.

Q. The total. Says balance of lumber production. Does that figure assume, and the 150 million feet used throughout, assume only existing cutting contracts at the time this purchase was made, or does that figure assume some additional acquisition of cutting contracts from the Forest Service?

A. It does. It assumes that additional timber up to an aggregate of 150 million feet above the contracts on hand would be acquired.

Q. Not—no.

A. I am sorry. May I clarify that? The 150 million feet includes two things: Timber under contract plus [1,148] additional timber to be acquired to make up the total of 150 million feet.

Q. You arrived at that on the 30 million feet per year projected on the Plaintiffs' exhibit referred to? A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. For a period of five years?

A. Yes, sir.

Q. Now at my request, Mr. Rosenthal, did you prepare an analysis and computation adjustment shown on Plaintiffs' Exhibit 12, limiting that projection and calculation to the actual cutting contracts that were acquired and the amount of timber on hand as of March 1, 1959?

A. Yes, sir.

(Defendants' Exhibit Q marked for identification.)

Q. (By Mr. Moore): Mr. Rosenthal, the Clerk has handed you Defendants' Exhibit Q for identification. Let me ask you if that is calculated upon the same basis with respect to charges in depreciation, and so forth, you have described in the prior exhibit?

A. Yes, sir.

Q. And is that computation limited to the amount of timber that was acquired in this sale and had not been cut prior to March 1, 1959?

A. Yes, sir.

Q. And then divided on a fifty-fifty basis, or does this [1,149] include—this is divided, I assume, is it not?

A. It starts off with a division of the timber. The total timber is some 24 million feet.

Q. That is where the division was made?

A. That is right.

Q. In other words, this is calculated actually upon 12 million—

A. That is right.

(Testimony of Joseph Rosenthal.)

Q. —195,311 feet of timber?

A. That is correct.

Mr. Moore: We offer in evidence Defendants' Exhibit Q upon that identification.

Mr. Romley: May I inquire on voir dire?

The Court: Yes.

The Witness: May I make one correction? This is computed on the basis of timber under contract, not on the basis of 150 million feet, for depreciation purposes.

Mr. Moore: I see. All right.

Voir Dire Examination

Q. (By Mr. Romley): Does Exhibit Q take into consideration in any way, Mr. Rosenthal, the figure for risk and hazard?

A. No, sir. A footnote was made on the bottom of the page, Mr. Romley. [1,150]

Q. And this relates—is this a computation based on timber available March 1, did you say?

A. That is right.

Q. 1959?

A. 1959, that is right. And no milling contract.

Mr. Romley: If the Court please, we object on several grounds. First, no proper foundation has been laid, and, second, the date March 1 is not the material date here. As the evidence shows, we offered, Mr. Liberman finally concurred, to exercise our option on January 6th, 1959. That date is a date subsequent to that.

(Testimony of Joseph Rosenthal.)

Mr. Moore: I first object to the statement as a misquotation of the evidence, and under the defendants' evidence there never in fact was an offer made. However, I realize that the evidence is that, from both sides, that the defendants refuse to recognize the claimed rights of the plaintiff. Now this, if the Court please, is an analysis and a computation based upon, as the witness has explained, the plaintiffs' exhibit, with certain adjustments. Now, I am at a loss to know what date is the applicable date if the plaintiff has made a case. But under our stipulation the evidence shows the timber that was acquired, it shows what was cut in December, it shows what was cut in January and it shows what was cut in February. And it is a simple matter of calculation if the date is prior to March 1st. We certainly [1,151] do not offer the exhibit, if the Court please, upon the theory that we admit there is any liability for any damage. We offer the exhibit as an analysis and a proper approach to that problem of the exhibits in evidence, if and only if the plaintiff makes a case. So that this figure is illustrative, and the witness has explained the manner in which it was prepared and I think the Court indicated taking it for what it is worth. And that is the theory upon which we offer it. [1,152]

Mr. Romley: And I should add to my objection, your Honor, that there is no basis for computing profits on only 14,000,000 feet of timber. I don't

(Testimony of Joseph Rosenthal.)

see any basis in this evidence or anything thus far that would justify receiving any exhibit pertaining to profit on 14,000,000 feet, or double that even, operation.

Mr. Moore: I can point the evidence out if the Court does not recall it. The exhibit which shows the amount of timber under existing contracts that were acquired on November 6th.

Mr. Romley: Exhibit 9 you mean?

Mr. Moore: I mean one of the reports that you have put in evidence, one of our reports. One of the schedules attached, I think it's 33 and 34. Plaintiffs' Exhibit 16. That exhibit which the plaintiffs introduced in evidence, if your Honor please, shows a total of 34,086,873 feet of timber acquired by the defendants as of November 6th. The stipulation which Mr. Romley and I entered into that timber cut from the date of acquisition to March 1st was—I don't have that figure now, Mr. Romley, nine million something.

And we stipulated as to the amount cut each month because we rounded it out, because we didn't have the exact figures. So that that left a balance as of April 1st of twenty-four million plus feet of timber, and this exhibit simply divides it in [1,153] half.

Mr. Romley: Well, it will probably serve no good purpose to argue what the evidence does show. I think it probably should be received and give it the weight it deserves depending on the evidence.

(Testimony of Joseph Rosenthal.)

The Court: Very well. Have you offered both of them?

Mr. Moore: I didn't offer the first one yet. I offer Defendants' Exhibit Q. To offer Defendants' Exhibit P in evidence, your Honor, I would have to avow, which I am happy to do, that we have another witness who I believe will qualify—well, I'm certain he will qualify as an expert in the field of evaluating timber cutting rights, and that he will testify in substance that a discount rate for risk involved in this kind of a transaction in this period of time is the figure shown, that is the—I think that was the lacking part of the foundation for Exhibit P. I can either withhold it until we have the witness or the Court can accept my avowal.

The Court: Perhaps you'd better wait. Exhibit Q will be received.

(Defendants' Exhibit Q received in evidence.)

Direct Examination—(Continued)

Q. (By Mr. Moore): Mr. Rosenthal, did you make an examination of the plaintiffs' reports in evidence, and under these exhibits to determine profit of the plaintiffs' operation based upon [1,154] percentage of invested capital?

A. Would you repeat the question, please, Mr. Moore?

Mr. Moore: Maybe it's not intelligible. Let me withhold that for the time being, your Honor. I am a little lost, if I may confess. If Mr. Romley

(Testimony of Joseph Rosenthal.)

would desire to participate or start in cross examination and finish a subject, fine. If not, I would prefer to withdraw this witness until in the morning to complete the other—the rest of his examination is going to be very brief.

Mr. Romley: Well, I would prefer that I take all my cross examination at one time. Perhaps you can show him the analysis and let him tell you what it is and you won't have to find out.

Q. (By Mr. Moore): Let me ask it this way then, Mr. Rosenthal: Did you, at my request, obtain copies of the published reports of the Southwest Lumber Mills, Inc., for a period of years?

A. Yes, sir.

Q. And from those reports did you make a calculation as to the reported profit in percentage of invested capital?

A. Yes, sir.

(Defendants' Exhibits R, S, T, U, V and W marked for identification.)

Q. (By Mr. Moore): Mr. Rosenthal, I think we can do it quicker if you would look at Defendants' Exhibit R, these five, [1,155] through V, and tell us what each one is, starting with Exhibit R?

A. These are——

Q. Start with this one, just tell us what it is, what each one is?

A. This is the published annual report for the fiscal year ended April 30th, 1959, of the Southwest Lumber Mills, Inc.

(Testimony of Joseph Rosenthal.)

The Court: What letter is that?

Mr. Moore: That is Exhibit R.

A. And then Exhibit S is the same type of report for the fiscal year ended April 30th, 1958; and T for the fiscal year ending April 30th, 1957; U for the fiscal year ending April 30th, 1956; and V for the fiscal year ending April 30th, 1955.

Q. Now, let me hand you Defendants' Exhibit W for identification and tell me what that is?

A. That is a summary which I personally prepared containing certain excerpts from these annual reports.

Q. What excerpts did you take?

A. I took the net income before provision for income taxes, I computed the interest at 6 percent per annum on the capital at the beginning of the year, and I deducted that interest, and arrived at the net income before taxes after 6 percent on capital at the beginning of the year. Then I showed the amount of capital at the beginning of the year and the amount of sales during the year and added the five years [1,156] together, showed the total, divided by five and obtained an annual average.

Q. Annual average of what?

A. Of each of the items that I mentioned, that is the net income before taxes, the interest on the capital, deducted from that net income is the net income before taxes after the interest, I obtained the average capital during each of the five years and the average amount of sales during the five years.

(Testimony of Joseph Rosenthal.)

Q. Did you calculate the percentage of profit, average percentage of profit as shown from those statements based on capital?

A. I did mentally, I did not record it on these statements.

Q. Would that be a very difficult task to do to put it on there? A. No, sir.

Mr. Moore: With the Court's permission, I would like to have the witness make that calculation and put it on the exhibit, if I could withdraw it for that purpose, I thought that that was shown on it.

Mr. Romley: I have no objection if he withdraws it permanently, your Honor.

The Court: Very well, it may be delivered to Mr. Moore for that purpose.

Mr. Moore: We offer in evidence Defendants' Exhibits [1,157] R through V.

Mr. Romley: These exhibits have no probative value, no proper foundation has been laid, your Honor. They are hearsay. I don't know what more I could say.

Mr. Moore: Well, look at them. This is another exhibit, your Honor, that is offered, will be with this one as illustrative and as a basis to view this problem, if we get into that problem.

The Court: Well, the reports are certainly hearsay, Mr. Moore.

Mr. Moore: I realize that, I realize that.

(Testimony of Joseph Rosenthal.)

The Court: The objection will be sustained.

Mr. Moore: Let me make this further observation, if your Honor please, on those: As I say, they are purely illustrative, the figures that are on Plaintiffs' Exhibits 9 through 13 may well be considered utterly ridiculous, maybe the Court will think the figures on the two analyses we have made are utterly ridiculous. These published statements of the largest operating company in Arizona, published, the stockholders and brokers when they show the capital, net income, they were using that solely to get some kind of a pattern for whatever help it is to the Court as to the income on a percentage basis in relation to invested capital, and then, of course, my next step will be to make a comparison of that and these exhibits. [1,158]

The Court: No, the ruling will stand.

Mr. Moore: I assume then if the Court please, that under the Court's ruling it is not necessary for me to make a further computation on Defendants' Exhibit W.

The Court: I take it from what the witness has said that what's been rejected is foundational to W, so there would be no point in it.

Mr. Moore: Thank you, and I will officially return it to the Clerk, for the record.

The Court: We will recess until 9:30 in the morning.

(Whereupon, a recess was taken from approximately 4:30 o'clock p.m. on May 12, 1960, until 9:30 o'clock a.m. on May 13, 1960.) [1,159]

May 13, 1960, 9:30 O'Clock A.M.

Mr. Moore: Just a minute, I have a matter to take up with the Court. If your Honor please, after court recessed yesterday afternoon counsel for plaintiff handed to Mr. Liberman a subpoena duces tecum to appear at 9:30 this morning and bring Federal and State informational Income Tax Returns of Duke City Lumber Company, a partnership, for the fiscal years ending in '56, '57, '58 '59 and '60.

Now, in addition to it being somewhat late to subpoena records that are in Albuquerque, I want to point out that I have not had time to prepare a written motion to quash this subpoena, I want to do it orally. We move to quash it upon these grounds: First, it is oppressive for the reason that those records are in Albuquerque and are not available here. Second, I don't know what an Informational Return is. I assume, however, they mean the partnership return. For the years ending 1956, 1957 and 1958, the fiscal years—and their fiscal year is January 31st—that would cover a period of time prior to the time that they acquired the Winslow operation. It would contain no information whatsoever with respect to the Winslow operation, and in fact their business includes some other ventures other than just the operation of a saw mill and the planing mill. That information would not be relevant to any issue in the case now. For the return that was filed in [1,160] 1959 for the fiscal year ending January 31st, 1959, would cover only approximately

one month of any operation they may have had after acquisition of the Winslow property.

The partnership return for the fiscal year 1960 I will avow has not been prepared, because an extension has been obtained within which to file it.

Now, in addition to that, if your Honor please, in the interrogatories heretofore filed the Court sustained our objection to the interrogatory number 46 which requested this very same thing. We did answer interrogatory number 45 stating that the partnership had filed a Federal Income Tax return with the Internal Revenue Service at Albuquerque, New Mexico, for the fiscal year ending January 31st, 1959, and with the New Mexico Bureau of Revenue, Income Tax Division, for the same period, and that the individual defendants had filed Federal Income Tax returns with the Internal Revenue Service at Albuquerque, New Mexico, for the year 1958.

Those answers were served on the 25th day by mail, I believe, 25th day of February of 1960.

Now, on the eve of the trial we come in with a subpoena for these records, and we do not have them here. It's an impossibility to get them here today, probably even tomorrow. And furthermore, as I have said, everything prior to the fiscal year 1959 would have no bearing whatsoever, and '59 could not have any information that would be of any benefit in determining [1,161] the issues in this lawsuit.

The Court: May I see the subpoena. I will hear counsel.

Mr. Romley: If the Court pleases, yesterday during the course of the direct examination of Mr. Rosenthal, who is still on the stand, it occurred to me that much of what he has said can be answered by the information that will be contained in the partnership returns of Duke City for the same years that he has been talking about thus far during this trial.

It is for that reason that we decided late yesterday afternoon to have a subpoena issued and served.

Now, it is true that in the interrogatories we asked them to attach copies of Federal returns, et cetera. And as your Honor well pointed out, and correctly so at the time of the hearing on the objections to that, you can't reach—or it's not proper in an interrogatory to say: "Attach copies of this or that." It's not a proper interrogatory. Insofar as this being available, these past years, it occurs to me that counsel could have called last night to Albuquerque and had them send them over here. The Court well knows that during the progress of this trial there were several items that counsel requested we bring down from Winslow which we did. I didn't ask him to bring these, I felt that he would refuse to do so and it is for that reason that I subpoenaed it. I think they are important, I think they will show information—of course I have never seen them, I can't avow this. But I

[1,162] have good reason to believe that they will show information that will go a long ways in counteracting the testimony of Mr. Rosenthal.

Now, so far as time is concerned, Mr. Jenkins is here, he has the company plane and he will be happy to fly Mr. Cavanaugh or anyone that they wish and pick them up, and he can be back here by 2 o'clock this afternoon.

Mr. Moore: I don't know whether he wants to assume that risk.

The Court: The motion is granted, the subpoena will be quashed. It isn't timely, and in the circumstances would be oppressive at this hour. That will be the Court's ruling on that.

JOSEPH ROSENTHAL

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Moore): Mr. Rosenthal, did you, at my request, make an analysis and a computation of the Nagel '59 annual report and the profit shown therefrom after providing for interest on capital in the event that we put the two operations together and the interest figured on the capital required to buy the mill at Winslow, and with that make an analysis of the '59 [1,163] report with respect to net profit for the year 1959 as shown by that report?

A. Yes, sir. [1,164]

(Defendants' Exhibit X marked for identification.)

(Testimony of Joseph Rosenthal.)

Q. (By Mr. Moore): Mr. Rosenthal, the Clerk has handed to you Defendants' Exhibit X for identification, tell me what that is.

A. This is an analysis and computation of Nagels' 1959 profits adjusted to reflect the interest and depreciation which would be applicable if they did exactly the same operation in the Duke City plant as they did in their own Winslow plant. I assume—the only adjustments that I made were the additional costs which would be connected with the operation of the Duke City plant, that were not applicable to the Nagel plant, because the Nagel plant was owned by them and there was no interest being paid on the Nagel plant, whereas the purchase of the Duke City plant required payment of interest on \$650,000 and the interest had to be paid during that year. Then I also made provision for the interest on the \$500,000 minimum working capital that I discussed in one of the exhibits yesterday and I assume the depreciation on the Winslow plant would be as shown in the analysis and adjustments of Plaintiffs' Exhibit 11.

Q. Looking at that exhibit, Mr. Rosenthal, down to the figure in the right-hand column and including that figure 314, following operating profit of Nagel Winslow mill during 1959, after depreciation, before the adjustment; the portion of that exhibit, including that line that I read and that [1,165] figure above that, are those the figures taken and computed from the 1959 report in evidence of the Nagel Lumber & Timber Company?

(Testimony of Joseph Rosenthal.)

A. That and the exhibits which were discussed yesterday.

Q. I see. The depreciation is the one item from the other exhibits? A. Yes.

Mr. Moore: We offer in evidence Defendants' Exhibit X.

Mr. Romley: We object to it, if your Honor please, no proper foundation has been laid, no reasonable basis for a calculation for this kind. It has no probative value.

The Court: It will be received for such bearing as it may have. It represents the thesis of your adversary, Mr. Romley, as to certain points that are in the case and the Court will give it the weight it is entitled to.

(Defendants' Exhibit X marked in evidence.)

Q. (By Mr. Moore): Mr. Rosenthal, did you also prepare a computation of per cent of return on invested capital, based on an analysis and adjustment of the computation shown in Plaintiffs' Exhibit 12 and the exhibits that you discussed yesterday? A. I did, sir.

(Defendants' Exhibit Y marked for identification.)

Q. (By Mr. Moore): The Clerk has handed you Defendants' [1,166] Exhibit Y for identification. Mr. Rosenthal, without giving the figures thereon, just tell us what that is?

(Testimony of Joseph Rosenthal.)

A. This shows what the average annual rate of return would be on the invested capital, based on all the computations that I discussed yesterday in the various exhibits, with one assumption, that the plant would have been purchased for \$650,000 cash and that that amount would have been a capital contribution of the partners, and that the \$500,000 of working capital that I referred to would have been borrowed at six per cent per annum. I then determined on the average annual rate of return during the five year period would have been on that \$650,000 initial capital investment.

Mr. Moore: We offer in evidence Defendants' Exhibit Y.

Mr. Romley: I will make no objection to it, your Honor. I don't think it has any bearing.

The Court: It may be received.

(Defendants' Exhibit Y marked in evidence.)

Mr. Moore: If the Court please, so that the exhibit can be offered without waiting for further foundation, Defendants' Exhibit P, the Court will recall, is I think five pages and the last page was a computation with a discount rate for hazard which we did not have, as I advised the Court, we did not have the foundation laid at that time. Rather than hold the exhibit out until we can lay the [1167] foundation I would prefer to take that last page off of the exhibit and reoffer the exhibit without that last page, then I later will offer that when I do have the foundation.

(Testimony of Joseph Rosenthal.)

The Court: Does the Clerk have "P"?

The Clerk: Yes, your Honor.

The Court: Is there any objection to that, Mr. Romley?

Mr. Romley: Being in conformity with his theory, I make no objection.

The Court: The Court is removing the last page of Defendants' Exhibit P for identification and ask the Clerk to remark the back of the fourth page with the Defendants' Exhibit P for identification.

Mr. Moore: We now offer in evidence Defendants' Exhibit P for identification.

Mr. Romley: I think it should be received, for what it is worth, without taking time for an objection.

The Court: It may be so received.

(Defendants' Exhibit P marked in evidence.)

Mr. Moore: You may examine.

Cross Examination

Q. (By Mr. Romley): Mr. Rosenthal, how long have you had any experience in representing clients in the accounting or tax consultant [1168] field or business advisory field who are engaged in the lumber business?

A. My daddy was in the lumber business. I didn't represent him professionally. He was in the lumber business as far back as 1910 that I can

(Testimony of Joseph Rosenthal.)

remember. He was in business earlier than that, but my earliest recollection goes back to 1910.

Q. You weren't old enough to advise him then?

A. I'm sure I was not. He used to discuss his affairs with me.

Q. Do you have my question in mind, sir?

A. Yes. I would say since the early 1940's or middle 1940's.

Q. Prior to that time had you had any experience at all as far as advising clients in the category that I mentioned?

A. Other than in the lumber business?

Q. I mean in the lumber business.

A. No, sir.

Q. Since early or middle 1940's, how many clients have you advised or represented as a Certified Public Accountant or as a tax consultant who are in the lumber field?

A. The Southwest Lumber Mills and Duke City interests.

Q. Just those two? A. Yes, sir. [1169]

Q. To what extent have you represented the Southwest Lumber Mills in these fields?

A. On some special matters.

Q. What were the special matters?

A. Taxation principally.

Q. You say taxation principally, what else?

A. I represented the Southwest Lumber Mills in connection with my first meeting with Mr. Liberman. At that time they were working out a

(Testimony of Joseph Rosenthal.)

matter pertaining to the lumber business, and I was representing the Southwest Lumber Mills as against Mr. Liberman. That was how I met Mr. Liberman.

Q. That was '42, '43?

A. Around that, the early 40's.

Q. Was that a tax matter?

A. It was a combination tax and business matter.

Q. Was that at the time Mr. Liberman was working for Southwest Lumber Mills as a checker, which was the capacity I believe he identified himself in when he commenced working there?

A. That was at the time when the interests of Mr. Liberman were set up in that remanufacturing plant, I believe he mentioned in his testimony. He was not a checker.

Q. Was he a partner in Southwest in that transaction? A. No, sir.

Q. One of the stockholders in the [1170] corporation? A. In Southwest?

Q. Yes, or in the Transit Remanufacturing.

A. In the Transit Remanufacturing, yes.

Q. Since that time, '42, '3, '4, or thereabouts, have you represented Southwest Lumber Mills in any capacity at all? A. Yes, sir.

Q. When and in what regard?

A. I would imagine it must have been somewhere around 1947 or '8, or '50, around that pe-

(Testimony of Joseph Rosenthal.)

riod, in connection with some accounting matters and tax matters.

Q. Have you had any similar representation since? A. No, sir.

Q. The last one dates back to about 1950 or perhaps a little earlier?

A. Or perhaps a little later, in that area.

Q. Your best recollection in 1950?

A. Yes, sir.

Q. When you met Mr. Liberman was he living in Albuquerque then? A. I believe so.

Q. And have you continued to represent him since shortly after you concluded this matter that you were against him on, you say, with Southwest Lumber Mills?

A. Yes, sir. Except when you use the term "against," it [1171] wasn't a battle, anything of that sort. They were working out a transaction between the two interests and I represented Southwest Lumber Mills in the transaction in which they were trading out with him. I was on the other side. I don't want to leave the impression there was any litigation, anything like that.

Q. Have you represented him since that time?

A. Yes, sir.

Q. I think you said you are his tax consultant and you either said business or financial advisor, I don't recall which?

A. I said financial advisor.

(Testimony of Joseph Rosenthal.)

Q. What do you mean by that?

A. By that, I advised him primarily on matters pertaining to finances, rather than on matters pertaining to sale and production of merchandise.

Q. Has that representation continued almost from the beginning of your representation of Mr. Liberman, have you served in that same capacity all these years? A. Yes, sir. [1172]

Q. Has he or was he when you first met him engaged exclusively in the lumber business?

A. To my knowledge, yes, sir.

Q. And by that I assume you mean in the production of timber into lumber and the sale of timber, is that right? A. No, sir.

Q. The sale of lumber, is that it?

A. No, sir.

Q. Tell me what it is?

A. He was engaged in the manufacturing business, they had a yard and plant at Albuquerque. In the later years they began to acquire timber interests.

Q. And in the intervening years from '43 or '4, thereabouts, to the present time has he engaged in any other activities that are not directly connected with the lumber business? A. Yes, sir.

Q. And what?

A. In various ventures. He has had some real estate ventures, uranium ventures, oil ventures.

Q. He consulted you with regard to them?

A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Both in a business way and financially?

A. Yes, sir.

Q. Has it been his practice through the years to take up [1173] every major acquisition of properties or businesses?

A. I couldn't answer that in the form in which you put the question.

Mr. Moore: Take up with whom?

Q. (By Mr. Romley): I mean take up with you, Mr. Rosenthal?

A. Well, he would discuss most things with me. Some he would, some he wouldn't.

Q. Now, he had, when you first met him, only an interest in one plant and that was in Transit Remanufacturing, is that correct?

A. I believe that is correct.

Q. I think he testified the other day that they—and named some five or six, and one he didn't recall. Did he consult you at the time of the acquisition of these other five or six or seven plants?

A. One of them, I don't know if that was one that he mentioned or not, but he did.

Q. Which one do you recall, sir?

A. Gallinas.

Q. Gallinas? A. Yes, sir.

Q. Do you remember whether he consulted you in connection with the acquisition of any of the others?

A. I think not, I don't recall of any. [1174]

(Testimony of Joseph Rosenthal.)

Q. When was Gallinas acquired?

A. I'd have to test my memory, but it was a long time ago. I'd rather somebody tried to refresh my recollection on it, I know it was quite some time ago, somewheres around 1950, I'd say.

Q. And did he acquire the entire interest or only a part? There were some you remember that he has only a part interest in?

A. This one the entire amount.

Q. Was that an outright purchase?

A. Yes, sir.

Q. What particular matters has he discussed with you in the tax field?

Mr. Moore: I don't see the materiality or relevancy of that, if your Honor please, and I object on that basis.

The Court: I don't think it's material.

Q. (By Mr. Romley): In connection with your advising Mr. Liberman as a tax consultant, has he taken up matters with you relating to depreciation of machinery and equipment?

A. Only in a broad, general way.

Q. In connection with the acquisition of the Gallagher properties here in Winslow, in which you took part or participated in negotiations, did you advise him with regard to depreciation?

A. No, sir. [1175]

Q. Do you know whether he received any advice in that regard?

A. From me?

Q. From anybody.

A. I wouldn't know.

(Testimony of Joseph Rosenthal.)

Q. He never discussed it with you in any way?

A. No, sir.

Q. Have you ever been to the Winslow plant?

A. No, sir. I might say the only discussion we had on depreciation, I think you asked me before, was as to whether or not salvage value had been deducted, and I said that I took that up to make sure that it was, and that I recall.

Q. Has your relationship with Mr. Liberman from the beginning, then, been on a rather very friendly basis? A. Yes, sir.

Mr. Moore: Object to that, if your Honor please. I don't see any relevancy to that.

The Court: He may answer, the answer may stand.

A. Yes, sir.

Q. (By Mr. Romley): Does he make frequent trips to New York and consult with you?

A. You'd have to define "frequent" for me, Mr. Romley.

Q. How many trips on an average does he make during a year to New York and discuss matters with you? A. Maybe one a year. [1176]

Q. And has that been the situation for the past five or ten years at least?

A. I would think so.

Q. And how many of those occasions have you met him at the airport?

A. Whenever I know he is coming.

(Testimony of Joseph Rosenthal.)

Q. Every time you know he is coming?

A. That's right.

Q. On how many of those occasions have you——

A. May I correct that answer, whenever I know on what plane he is coming.

Q. Do you have other out of State clients?

A. Oh, yes, sir.

Q. Do you make it a practice to meet your out of State clients at the airport?

A. Whenever I get the opportunity, yes, sir.

Q. How many times have you spent the entire day and night with Mr. Liberman as you say you did on the 15th, the night of the 15th and the morning of the 16th?

A. In addition to that one the only one I can remember now is in connection with the purchase of the Gallinas plant some ten years or so ago when we were both out to the Gallinas and spent the night together. I'm sure that we may have in the meantime, but I just don't recall.

Q. Was the purchase of the Gallinas plant negotiated in [1177] New York? A. No, sir.

Q. Were any of the parties who were selling the Gallinas plant present in New York on that occasion?

A. On which occasion? It wasn't done in New York.

Q. No discussions even there?

A. In New York?

Q. Yes. A. No, sir.

(Testimony of Joseph Rosenthal.)

Q. As Mr. Liberman's tax consultant and financial advisor have you come to know something about his business and his business ability?

A. Yes, sir.

Q. About his work?

A. What does that mean, Mr. Romley?

Q. About what he has in the way of financial assets? A. Yes, sir.

Q. And about what he earns in these various enterprises? A. Yes, sir.

Q. You think your information in that regard is fairly accurate, sir?

A. With records it would be more accurate than it would be from memory.

Q. You do have some memory in that regard?

A. Yes, sir. [1178]

Q. In your work in the field about which you have testified have you come to know the profits that can be earned by a good, efficient operator of a lumber mill?

A. I saw one just a few days ago, the nearest one to the group around here at Southwest Lumber Mills. I studied their report a few days ago for a five-year period.

Q. Is that the only answer you can give me to the question I asked?

A. I think it's the best answer, the most correct answer because I studied no others.

Q. Have you ever studied Mr. Liberman's?

(Testimony of Joseph Rosenthal.)

A. I thought you meant in addition to Mr. Liberman's.

Q. Well, have you studied Mr. Liberman's?

A. Yes, sir.

Q. And Southwest? A. Yes, sir.

Q. Any others? A. Nagels'.

Q. Any others? A. No, sir.

Q. And do you know what the net profits were of the Duke City Lumber Company during the fiscal year ending January 31st, 1959?

Mr. Moore: We object to that, if your Honor please, because that was prior to the acquisition of Winslow and [1179] furthermore it's not limited to per feet on lumber milled, they handle a lot of other materials other than what they mill.

The Court: What was the question?

(Whereupon, the pending question was read by the reporter.)

The Court: He may answer if he knows.

A. I don't know offhand, Mr. Romley.

Q. (By Mr. Romley): You mean by that you don't know exactly or——

A. I don't even know approximately, Mr. Romley.

Q. You don't even know approximately. Do you know approximately what the net earnings of the Duke City Lumber Company, a partnership, was on a per thousand foot basis during that same period? A. No, sir.

(Testimony of Joseph Rosenthal.)

Q. Mr. Rosenthal, certain exhibits were offered in evidence yesterday and today, I believe starting with O and ending with Y. Were all of these prepared by you? A. Yes, sir.

Q. Have you prepared any other exhibits than these I just mentioned in connection with this case?

A. I prepared the summary of the Southwest Lumber Mills profits during the five-year period that was shown here yesterday.

Q. Any others? [1180]

A. I assisted in the preparation of some of the answers to your interrogatories, if you are referring to those.

Q. You mean some of the—well, by that do you mean the answers and also the schedules that in some instances are a part of the answers?

A. Some places some and some places others.

Q. I see. Have you seen and examined all of the schedules that are attached to the answers to the interrogatories?

A. If you take out the word “examined” because I believe, Mr. Romley, that word “examined” has a totally different connotation to you than it does to a certified public accountant. If you say have I looked at them, the answer is yes.

Q. Well, tell me the extent to which you looked at them, whether you just glanced over them, whether you studied them, whether you assisted in their preparation, whether you assisted in assembling data or made suggestions with regard to their preparation and things of that sort?

(Testimony of Joseph Rosenthal.)

A. I did nothing with regard to assembling data, I did make some suggestions as to the manner of their preparation and I did look them over casually, did not study them in detail.

Q. Was that done in New York or Albuquerque?

A. Both places.

Q. Have you taken an active part in the advising of Mr. Liberman with regard to this [1181] trial?

A. That depends on what you call active.

Q. Taken any part? A. Yes, sir.

Q. To what extent?

A. That's a very difficult question to answer because you'd have to narrow it down to specific matters. I have discussed the various phases with him, I have discussed them with counsel, I have discussed them with some of the other people and to state exactly what I did with each one I just couldn't possibly do that.

Q. Did you—you say you made suggestions with regard to the preparation of the schedules—some of the schedules?

A. Some of the schedules, yes.

Q. Attached to the interrogatories?

A. Yes.

Q. Answers to the interrogatories. When you did that in New York who came out to consult you?

A. Nobody, that was over the phone.

Q. Over the phone. And when you came to Albuquerque with whom did you work or discuss the matters? A. Principally Mr. Cavanaugh.

(Testimony of Joseph Rosenthal.)

Q. Did you have any part in the preparation of the exhibit which is attached to the answer to one of the interrogatories which was referred to yesterday as the Winslow U and O statement? I think it's number 15. [1182]

A. I missed the first part of the question, Mr. Romley.

Mr. Romley: Read it, please.

(Whereupon, the pending question was read by the reporter.)

A. I never saw it until after this trial started, nor even heard about it.

Q. I beg your pardon?

A. I never saw it nor heard about it until after this trial started.

Q. After the answer—you saw all the interrogatories, did you? A. I believe I did.

Q. Were they sent to you in New York?

A. I don't recall if they were sent to me in New York or I saw them in Albuquerque.

Q. Was a copy delivered to you to be retained by you? A. Yes, sir.

Q. Do you still have it? A. I believe so.

Q. Were copies of the answers to the interrogatories delivered to you and to be retained by you?

A. Yes, sir.

Q. Did you examine them when they—again I'm using you have indicated I shouldn't. Did you look at them, sir, when they were—when you received them? [1183] A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Did you read them other than just looking?

A. Yes, sir.

Q. Did you make any study of them?

A. "Study" is a hard word to define, Mr. Romley.

Q. It's difficult for me to ask you the question since—you tell me what you did with regard to those schedules?

A. I read them and the parts that were of interest to me I read more carefully than the parts that were out of my scope of work.

Q. I see. Were there any of them that were out of your scope of work?

A. I have a feeling there were.

Q. I mean insofar as the schedules are concerned?

A. Insofar as the schedules are concerned?

Q. Yes.

A. I don't recall just what they were. If I could look at the schedules I could tell you more correctly.

Q. Well, did you read and consider to some extent, at least, all of the schedules?

A. Yes, sir.

Q. Well, then, you are not entirely correct, are you, when you say you never saw the Winslow U and O statement until this trial commenced?

A. I think we misunderstood each other. I meant to say [1184] until this litigation commenced. When I used the word "trial" I meant the word "litigation." I'm sorry.

(Testimony of Joseph Rosenthal.)

Q. This litigation commenced last April, if I remember correctly, when the Complaint was filed?

A. I tell you when I first saw it, Mr. Romley, that's what you want to know?

Q. Yes, sir.

A. It was about February of this year.

Q. About February of this year?

A. Yes, sir.

Q. That was about the time the answers to the interrogatories were being prepared?

A. I would think so. That's the first time I saw them or heard about them, in connection with answering your interrogatory.

Q. Did you discuss that schedule now, I'm speaking of 15, this Winslow U and O operation at the time you saw it in February of this year?

A. Yes, sir.

Q. With whom did you discuss it?

A. I discussed it with Mr. Cavanaugh, Mr. Liberman and with Mr. Edsel, who is referred to in the testimony.

Q. Did you—was that at Albuquerque?

A. Yes, sir. And of course with counsel.

Q. Do you have that statement—that schedule before you, [1185] that's number 15?

A. Yes, sir.

Q. Did you note when you saw it in February of this year that Mr. Cavanaugh, in its preparation, had shown net profit per thousand of \$15.63?

A. On this schedule, yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Was that profit or the amount of that profit in keeping with any knowledge or information you had at that time with regard to what a good, efficient operator could make from the operation of a lumber mill?

A. I don't think I am qualified to answer what a good, efficient operator could make out of a lumber mill. My familiarity with it, as I told you, is what the Libermans do in their business and I also assume that Southwest Lumber Mills is an efficient operator, at least I bought some stock in them.

Q. Do you consider Mr. Liberman as an efficient operator? A. Yes, sir.

Q. I think you referred to him sometime as quite an able businessman?

A. If I didn't before I will now.

Q. Was this figure shown on Exhibit 15, net profit per thousand of \$15.63, in keeping with what you knew regarding the past profit of Duke City per thousand?

Mr. Moore: We object to that, if your Honor please. [1186] The witness has answered he did not recall that figure, and we are dealing with an estimate that was made by Mr. Cavanaugh under the conditions which he has described.

The Court: Well, the witness may answer the question.

(Testimony of Joseph Rosenthal.)

A. I don't think I'm qualified to answer what a lumber man, even Mr. Liberman, would make in connection with this schedule because the only figures that I would be familiar with in Mr. Liberman's operation are the total, overall operations which includes all problems, all different kinds of lumber, manufacturing, buying, making molding, selling, financing and things of that sort, and I do not have any information whatsoever as to what a reasonable profit would be even in Mr. Liberman's operations and the operation of a single division of that business, like a single mill.

Q. Well, when this Exhibit 15 was first seen by you I assume that was in Albuquerque?

A. Yes, sir.

Q. During the course of the preparations of answers to interrogatories? A. Yes, sir.

Q. In which you were called in to consult and advise? A. Yes, sir.

Q. And at that time when Mr. Cavanaugh showed you this he said to you, in substance or in fact, "This net profit per thousand is what Arizona Timber was making in the Winslow [1187] operation, isn't that true? A. No, sir.

Q. Did you ask him if it did?

A. It did what?

Q. If it showed the net profit per thousand of the Winslow operation?

A. I doubt if we discussed that.

Q. You mean you saw that figure and just didn't do anything more about it?

(Testimony of Joseph Rosenthal.)

A. I did a lot more about it, Mr. Romley, if you'd ask me.

Q. You say you doubt if you even discussed this figure?

A. No, sir, I didn't say that. You asked me——

Q. What did you say?

A. I understood you to say——

Q. What did you say, sir?

Mr. Moore: We object to that, if the Court please.

The Court: Read that question and answer.

(Whereupon, the questions and answers appearing on page 1,187, line 23 to 25, and on page 1,188, line 1 to 7, inclusive, were read by the reporter.)

Q. (By Mr. Romley): You doubt if you discussed the net profit of the Winslow operation?

A. That's right.

Q. Did you, at that time, know what was the net profit [1188] of the Duke City operation per thousand?

A. At the time we were discussing this?

Q. Yes. A. No, sir. [1189]

Q. Did it strike you as perhaps being important to compare the profit shown on this Exhibit 15 as against the profits that might be reflected on the books of Duke City?

A. I saw the two numbers as answer to exhibit 40, or Interrogatory No. 40, and I saw this number.

Q. Interrogatory No. 40 showed \$6 and some cents, did it not? A. I believe so.

(Testimony of Joseph Rosenthal.)

Q. \$6.58. It is one of the typewritten pages, your Honor, rather than the schedule.

Interrogatory 40 appears on page 12 in the Interrogatories and the answer thereto appears on page 17.

Mr. Moore: If the Court please, this calls to my attention the fact that we filed a corrected schedule.

The Court: The corrected schedule shows \$5.79.

Mr. Moore: \$5.79. We now move to correct the answer on page 17 to 5.79 in lieu of the 6.58.

The Court: If there is no objection I will interline notation corrected to 5.79.

Q. (By Mr. Romley): Mr. Rosenthal, if I can get back to what I think I was examining you about, with regard to this Exhibit 15, the Winslow U & O, did you note when you saw the Exhibit 15 the net profit shown there of 15.63 per thousand and compared with the 6.58 per thousand contained in the answer at that time? [1190]

A. Yes, sir.

Q. Did that raise any question in your mind at all? A. It did.

Q. Did you discuss it? A. Yes, sir.

Q. With whom?

A. Mr. Cavanaugh, Mr. Liberman and counsel.

Q. This was in February in Albuquerque?

A. About that.

(Testimony of Joseph Rosenthal.)

Q. Now, the figure of 6.58 or 5.79 was arrived at after adding some costs or asserted costs that did not appear in the Arizona Timber operation, or do you know, sir?

A. I'm afraid I don't understand your question, Mr. Romley.

(The last question read.)

Q. Perhaps I can restate the question. The 6.58 or 5.79 figure, depending on which one you take, was arrived at after including an item for interest on all of these matters you have testified about here?

A. Yes, sir.

Q. Including the interest on the full \$650,000 all the time?

A. Yes, sir.

Q. Including interest on the 317,000 that was Mr. Liberman's personal obligation, isn't [1191] that right?

A. I don't recall offhand. I would have to look at the schedule to see if it does or does not.

Q. Doesn't it include interest on the \$405,000 represented by the obligation that he was to repay over a period of three years?

A. I don't remember whether it did or didn't, Mr. Romley.

Q. Let me direct your attention to Schedule F attached to the answers to the interrogatories.

A. Yes, it does.

Q. It does. That figure was arrived at after a figure for depreciation of something better than \$8 per thousand on the weighted average, isn't that right?

(Testimony of Joseph Rosenthal.)

A. I am not sure you understand that depreciation on weighted average, because that depreciation—I think the best answer to that is yes. There is depreciation in excess of \$8 in that schedule.

Q. That figure of \$5.79 or 6.58, as the case may be, was arrived at also after reflecting as a cost of production or expense in any event on cash discounts, including a computation on the fire loss and shipments to Duke City? A. Yes, sir.

Q. Which you know now were not paid, is that right, sir?

A. Yes, sir. I knew then they were not paid.

Q. You knew then, but still showed them [1192] here? A. Yes, sir.

Q. It included or it was arrived at also after adding as a part of the cost of production some 13 or \$17,000 for legal expense and a 13 or \$17,000 item for auditing expense, is that right?

A. I know there is an expense in there for legal and auditing. I don't remember the amount. Whatever is in there is correct.

Q. You know the major part of that expense is in connection with the defense of this lawsuit?

A. I don't know that. I know some part of it may be.

Q. Do you then know that part of it that is included therein representing a part of the expense of this lawsuit is not properly chargeable against cost of production so far as this lawsuit is concerned? A. I do not.

(Testimony of Joseph Rosenthal.)

Q. Do you think it is properly chargeable?

A. That is a matter for counsel to determine, whether it is or is not properly chargeable. From an accounting standpoint it is proper to include in the operating expenses of a business all of the expenses incurred in the business, including those unusual things which happen occasionally even in litigation. In the ordinary preparation of financial statements of companies showing their operating expenses, all of the expenses are included and prorated, where proration [1193] is necessary against different departments.

Q. This figure was arrived at after including a figure of I think around 12 or \$13,000 for occupational taxes, isn't that right?

A. I don't know what that is.

Q. Occupational taxes? I was mistaken as to the amount. Will you refer to Schedule D. I will show it to you, sir. Occupational taxes and license, \$7,040?

A. I am not familiar enough with that item to answer, Mr. Romley.

Q. Do you know whether that should or should not be included in there?

A. I don't even know what it is, Mr. Romley.

Q. That figure of 6.58 or 5.79 again was arrived at after charging against expense of operation or general administrative, in any event, in arriving

(Testimony of Joseph Rosenthal.)

at that figure of nine thousand odd dollars paid to Mr. Warren, a former partner, isn't that right?

A. The payments to Mr. Warren were included. I don't remember what the amount is. If the amount is on the exhibit then it is as you say.

Q. Mr. Warren is a former partner, is he not?

A. Yes, sir.

Q. Hasn't been a partner since about 1955 or '56, at least that long he has been away from [1194] it?

A. That is right.

Q. He hasn't performed any services for Duke City in any way?

A. He has not, sir.

Q. Did you feel it was proper to charge against this operation money as an expense of operation some money that was being paid to a former partner?

A. I certainly do.

Q. You believe that to be proper?

A. I certainly do.

Q. You consider it proper not only to charge it against Duke City operation in New Mexico, but also against this operation in Winslow which did not even exist?

A. I absolutely do.

Q. You absolutely do?

A. Yes, sir.

Q. Did you help negotiate the deal with Mr. Warren?

A. Yes, sir.

Q. Do you recall how long he was to be paid the 833.33 per month about which Mr. Grevey testified yesterday?

A. Yes, sir.

Q. Was it five years?

A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Mr. Rosenthal, you have, I guess we can say, examined rather carefully the series 7 exhibits here, the annual [1195] reports of the Nagel Lumber & Timber Company for the years '52 through '59, have you not?

A. I wish you wouldn't use the word "examined" to me, because for forty years the word "examine" means something different to me than it does to you and I can't adapt myself to the use of that word so quickly. I have looked at them and inspected them. If you would like to know what the meaning of "examine" means to me, I will be glad to explain it to you.

Q. All right.

A. To a Certified Public Accountant, when we say we have examined something and rendered an opinion in connection with that examination, that means we really did a job on it. I didn't do that kind of a job. But that word "examine" means something to a Certified Public Accountant different than it does to people other than C. P. A.'s.

Q. Means we have examined and rendered an opinion, my questions didn't encompass rendering an opinion.

A. The word "examine" itself means something to a C.P.A. that it doesn't to the layman.

Q. In any event to the extent that you studied this series 7 exhibit would you agree that the manner of setting up the statement of earnings is correct?

A. In Nagels?

(Testimony of Joseph Rosenthal.)

Q. Yes. [1196] A. Substantially.

Q. Is it not correct in any respect? Perhaps it would be fairer to you to let you see one of these, sir. A. Are you speaking as to form?

Q. Yes. A. I would say they are correct.

Q. Directing your attention to 7-I, Exhibit B, page 1959-4.

A. For the purpose of financial accounting, I will say these are correctly set up.

Q. Do you see an item for operating profit?

A. I do.

Q. And is that the way that the operating profit was set up on this schedule or Exhibit 10, I believe it was, showing the operating profit from the Nagels operation, operating profit from the Nagel mill before deducting depreciation?

A. It is not the way it was set up on that report.

Q. Did the changes consist only in this 7-I that we are speaking of, of charging only \$27,000 instead of the \$44,700 paid to the partners, and also in not including therein an item for depreciation?

A. That is correct.

Q. Except for that it is exactly in accord with the audited statement, is that correct? [1197]

A. For this one line, yes.

Q. Yes. Some point was made in the course of the cross examination of Mr. Brunell and I think also Mr. Nelson and by you yesterday with regard to items for bad debts? A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. And items for interest?

A. And to that extent I think I would have included the bad debts among the operating expenses and as to the interest I would have included them either in the operating expenses or down below where it appears here, depending upon the circumstances. There are different forms of presentation.

Q. Isn't this the usual form, sir, in certified public accounting practice to arrive at the net operating profit and to state below there as is on this Peat, Marwick & Mitchell report the bad debts and interest?

A. It was one of the usual forms. This is not standard practice followed consistently by all, Mr. Romley, by no means.

Q. Is that practice followed by you?

A. No, sir.

Q. Have you ever followed that practice?

A. Yes, sir.

Q. Have you more generally followed it than not?

A. I have more generally not followed it.

Q. You say it is a matter of preference among the, [1198] depending upon the individual accountant?

A. It is more than just that. Financial statements are not geared to a fixed pattern. The preparation of a financial statement should take into

(Testimony of Joseph Rosenthal.)

consideration the judgment of the individual preparing the statement, in order to present the statement in a manner that will be most informative to those that are going to use it. And a statement prepared for one purpose, Mr. Romley, is not necessarily the correct kind of statement to be prepared for another purpose, even though the figures are exactly the same.

Q. In your opinion, Mr. Rosenthal, do these statements which you prepared and which have been received in evidence as "P" and "Q," do you think they are informative to the extent necessary for this trial? A. I believe so.

Q. Is it your opinion that the net profit of the Nagel mill is as shown on your Exhibit Q of only \$1.41 per thousand?

A. After making provision for the adjustments which I believe to be proper, as shown on that statement, that is correct.

Q. I am interested, sir, if I can get it, as to whether in your opinion the total net profit made during the period shown by the Nagels upon which they would have to pay an income tax was only \$1.41 a thousand?

A. No, sir. That statement was not prepared for income [1199] tax purposes. That was what I meant, Mr. Romley, when I said that a statement prepared for one purpose is not necessarily a statement for another purpose, and even the statement you showed me a moment ago is not the same state-

(Testimony of Joseph Rosenthal.)

ment they used for income tax purposes, that I'm sure of, even though I wasn't there.

Q. Let me ask you this, sir. Is it your opinion that the net earnings of the Nagel Lumber & Timber Company during the years 1955 to 1959 inclusive were only \$1.41 per thousand?

A. I didn't say that.

Q. I know you didn't say it and I want to find out if you do say it.

A. If I can see the statement that I prepared I can tell you better. That statement you showed me a moment ago reflected their operations during the calendar year 1959. That was the only period involved. What it would have been if they would have operated the Duke City Lumber mill under exactly the same conditions as they had operated their own business in the Duke City Lumber mill and the only changes that I made were that I provided for the interest which they would have to pay by operating the Duke City Lumber mill on that \$650,000, I provided for interest on working capital, which doesn't appear anywhere. That is referred to as a computed cost, which I provided for in all these statements and discussed yesterday. I think those are the only [1200] adjustments that I made. And the depreciation of course as computed in one of the exhibits that I prepared, because the depreciation in the Duke City Lumber mill would obviously have to be done on totally different factors than depreciation on the Nagel mill, there were different factors involved.

(Testimony of Joseph Rosenthal.)

Q. Have you ever prior to this litigation in preparing a financial statement an item of interest on operating capital?

A. Yes, that is common practice.

Q. As affecting the net earnings of a business?

A. Yes, sir.

Q. And you prepare income tax returns?

A. Yes, sir.

Q. Do you deduct an item for interest on working capital that you don't pay?

A. That is the difference between income tax returns and other returns, and that is the reason I explained to you before, Mr. Romley, statements are prepared for different purposes, different figures. They are both honest but they are different normal requirements. For the purpose of preparing income tax returns, interest on capital is exactly the same thing as partners' salary. They can take twenty per cent interest or no interest. They could take one million dollars salary or no salary. The net actual income is the same, assume we are dealing with partners or individuals as we are here and not corporations. However, [1201] that has nothing to do with the preparation of a financial statement.

Q. Are you trying to be objective in the preparation of these exhibits that you produced yesterday and this morning, or are you putting it in a light most favorable to Mr. Liberman?

(Testimony of Joseph Rosenthal.)

A. Mr. Romley, I presented them as I would present them if I were asked as a Certified Public Accountant to make an objective determination of the figures that would be arrived at, starting with the exhibits that you submitted and making the adjustments that I think should be necessary.

Q. Are you saying that this business is capable only of earning \$1.41 per thousand?

A. I didn't say what it is capable of doing. I analyzed the figures. I am not saying what it is capable of doing. Incidentally, that one dollar something per thousand is after providing for interest on the working capital. So obviously the income, assuming that the partners contribute their own capital to the business and made no charge for interest, from that very statement you can determine that the profits would have been more than that.

Q. From Duke City statements you have seen prior to this litigation did they include an item for interest on operating capital before showing their net earnings?

A. It so happens they did. [1202]

Q. Do you have any of those statements here?

A. No, sir. It doesn't make any difference in their final profit because in their case they have different capital accounts for the partners as distinguished from their profit sharing ratios. Their figures are determined after providing for interest on partners' capital accounts and then the profit

(Testimony of Joseph Rosenthal.)

is determined and prorated on a percentage basis. But that is not necessarily conclusive in all cases.

Q. Ordinarily it is true that partners salaries are not taken into consideration at all in arriving at the net earnings of the partnership?

A. On the contrary. On the contrary, Mr. Romley. Ordinarily, and I might say that it would be wrong to arrive at the net earnings of a business without making provision for partners salaries where you are trying to determine the correct earnings of a business. For the purpose of income tax returns it is not necessary, or I should say Federal income tax returns, because in some of the states provision is made for it. But in the preparation of Federal income tax returns, since it makes no difference, it just makes no difference. But the Nagels themselves in their own report, for the period beginning October 1, 1957, did take into consideration in arriving at the net profit to be divided among the partners in accordance with the profit sharing ratio in the agreement, they did take into consideration [1203] as a deduction the amount of partners salaries.

Q. You didn't expect, did you if the Nagels were going to operate through Bob Jenkins and with Mr. Liberman the plant at Winslow to be acquired from the Arizona Timber Company there would be a charge so that Mrs. Nagel would be getting 60,000 a year and Bob Jenkins 30,000, did you?

A. We never got that far.

(Testimony of Joseph Rosenthal.)

Q. You added back here on this Exhibit P an item for Mrs. Nagel's salary, as you term it, for the years, the two and three-quarter years prior to the formation of the partnership?

A. I did, sir.

Q. You took a figure of \$30,000 a year?

A. I did, sir.

Q. You are aware of the fact that the exhibits presented on behalf of the plaintiffs here took out the \$44,400 paid to the partners and put in a figure of 27,000 on the premise that is what management would cost?

A. I am aware that is what they did.

The Court: Pardon me, Mr. Romley, we will take the morning recess.

(Recess.) [1204]

After recess:

The Court: Mr. Romley.

Q. (By Mr. Romley): Mr. Rosenthal, I believe when we recessed we were speaking of taking out the partners' salaries and replacing them with \$27,000? A. Yes, Mr. Romley.

Q. I assume you put them back in because you felt the \$27,000 was not sufficient, is that right?

A. No, sir.

Q. Did you feel the 27,000 was a fair management charge as we set it up in our exhibit?

A. I have no opinion on that.

Q. No opinion at all?

A. No, sir. I have some opinion, but I didn't do it because of any opinion that I had.

(Testimony of Joseph Rosenthal.)

Q. What is your opinion?

A. I don't think I am qualified to express an opinion, I have an opinion——

A. You told me, you volunteered you had an opinion. What is it, sir?

A. Well, I think my opinion is that the best answer is what the partners themselves thought was reasonable. The agreement, the partnership agreement provides that salaries shall be in an amount which is reasonable compensation for services or some words like that. I saw the partnership [1,205] agreement and what it provided. I saw the amount taken as salaries by the partners on their return. My opinion is that they are the best judge.

Q. Then you think that Mrs. Nagel's services in operating a twenty-five, thirty million foot mill are worth more than the \$24,000 a year that Yale Weinstein gets for managing the Liberman enterprises of eighty-seven million? Is that what you are telling us? A. As to that I'm sure——

Mr. Moore: We object to that, if it please the Court.

The Court: The objection is sustained.

Q. (By Mr. Romley): Well, now, you heard the testimony of Mr. Weinstein as to his compensation, did you not? A. Yes, sir.

Q. You know the services that he performs?

A. Not too well, sir.

Q. You know in a general way what he does?

A. Very general way.

(Testimony of Joseph Rosenthal.)

Q. You know in a very general way what Mrs. Nagel does, do you not? A. No, sir.

Q. You have a pretty good idea, don't you?

A. No, sir.

Q. Not in the slightest?

A. No, sir. I met Mrs. Nagel once in my life before this [1,206] trial, and I saw her again here.

Q. Do you know what a person, whether it's Mrs. Nagel or anybody else operating that business, managing that business as she says she does, not keeping time but coming in at 9, 10, 11 o'clock in the morning, whether her services would be worth more or less than the services performed by Yale Weinstein? A. I don't think——

Mr. Moore: We object to that, if your Honor please, no foundation laid.

The Court: He may answer.

A. I don't think that a value of the services are gauged by time. A certain individual might put in five times as much time as another individual and be worth one-tenth the compensation.

Q. Well, to summarize you have no opinion what the management charge should be?

A. For Mrs. Nagel?

Q. For the operation of the joint venture, Nagel and Duke City in the plant if they had acquired it?

A. I think that's a correct statement.

Q. And you will not challenge, then, and you do not challenge the charge we made of \$27,000 as being a fair management charge?

(Testimony of Joseph Rosenthal.)

A. I don't challenge that. I merely recorded the salaries [1,207] they took on the statement.

Q. Now, further with reference to Exhibit P, and this series of 7 of exhibits, the annual reports, you recall that we showed in one of our exhibits the—I think it was 10—the operating profit?

A. Yes, sir.

Q. Before depreciation and after making the change about salaries that we mentioned?

A. Yes, sir.

Q. You felt, I assume, did you, that in order to more accurately arrive at the picture, that you should bring in bad debts and interest?

A. Yes, sir.

Q. So on page 1 of P, Exhibit P which you prepared and was received in evidence, you showed interest during the five years of \$71,386.21 and bad debts of \$8,407.06, that's right, isn't it?

A. Yes, sir.

Q. Did you think that if you were going to take these two items which are shown below that net operating profit line in these exhibits, series 7, that it would also be fair then to bring in what we did not include, because we didn't think it should be, the item for other income which aggregated, for that same period, \$103,138.58?

A. No, sir, I did not. [1,208]

Q. Don't you think that if you are going to bring in the items of interest and bad debts that you should offset that with other income?

(Testimony of Joseph Rosenthal.)

A. If the other income pertains to the operation of the business, by all means it should. I had no way of knowing what some of those items of other income are, and if they would be properly identified and explained to me as being applicable to the operation of the business I would be the first one to say that provision should be made for them.

Q. Well, there was one item on Exhibit 7-I——

A. There are some, incidentally, that I know should not be adjusted, should not be provided for.

Q. And there are some that you know could be adjusted and brought in, is that right?

A. Yes, sir.

Q. Well, those that you did know, did you bring those in?

A. There is one that I know isn't, I believe provision was made for it but not in the direct manner in which you referred to it, but provision was made for the item of interest income even though I didn't make it in the way that you can see as a separate item on the statement. But it was in the framework of that statement that I made, Mr. Romley.

Q. Now, in Exhibit 7-I for the year of '59, do you see an item as other income, gain on sale of assets of thirty-eight thousand plus dollars? [1,209]

A. I did.

Q. Wouldn't it occur——

Mr. Moore: What page are you looking at?

(Testimony of Joseph Rosenthal.)

Mr. Romley: This is Exhibit B of that schedule, 4—1959-4.

Q. (By Mr. Romley): Does the item "Sale of other assets" mean anything to you as an accountant? A. It does.

Q. What does it mean?

A. It means that in the ordinary sense, I haven't any way of knowing—

Q. No, just—

A. As an ordinary accountant?

Q. What does it mean to you?

A. It means the amount realized from the sale or other disposition of assets in excess of their depreciated book value.

Q. And you had seen and examined carefully—excuse me, examined, look at and studied the depreciation records and schedule of the Duke City people, didn't you? Hadn't you?

A. Yes, sir.

Q. Did you see—

A. Pardon me a moment, I examined the schedule—I use the word "examined" for your purposes—the schedule which you submitted in one of the exhibits, that's what I took. I didn't [1,210] go beyond that.

Q. Well, this item of \$38,000 in 7-I to which I have referred is income to this business, is it not?

A. It is income to this business but does not belong as additional income in these exhibits that you mentioned. Now that you have brought it to

(Testimony of Joseph Rosenthal.)

my attention I saw it before, and after your questions, if I were asked to make that statement over again now with regard to this item I would do it exactly the same way I did, and would not consider this as an item of income to be reflected in that statement, and I will be glad to tell you why, if you want to know, Mr. Romley.

Q. It not infrequently happens that depreciated assets are sold for more than their book value, depreciated book value, is that right?

A. That is common.

Q. And it's reasonable to assume, is it not, that if Duke City and Nagel had gotten together and operated this mill that they might have that same experience? A. Mr. Romley—

Q. Now, please, can you answer it or not? If you can't, it's all right.

A. That's looking into the future. You take losses on assets, you take gains on assets. It could be either.

Q. And while we are on the subject of depreciation, in the projections which you made and are reflected in Exhibits P, I believe, P and Q, you took into account only the fact that the assets or machinery and equipment would be depreciated over some of them two years and some of them over five years, is that right?

A. I don't think I made any computation on two years.

Q. Well, during the normal life of this mill, in your opinion, sir, is it reasonable to expect that some of these items will be depreciated completely out and still be usable? A. Yes, sir.

Q. You found that to be true in the Nagel situation, that their saw mill, I believe, has been completely depreciated?

A. Yes, sir, that is common practice.

Q. And still being used? A. Yes, sir.

Q. The depreciation was all taken in the normal course of events? A. Yes, sir.

Q. So if that—it's reasonable then to believe, is it not, that these assets that you depreciated over the period of time reflected in your exhibit will still have utility and be usable in the lumber business after the period of time you have reflected?

A. You have asked me two questions in one. You asked if they will have utility and usable. They will have no utility, although they will be usable. Those are two different words. [1,212] The word "have utility" means that they will be usable in a place where they can be used. Under the computations that I made they were prepared on the assumption that comes the end of this five-year period, those physical assets would still be there but would have no utility as such because they would not be used in the operation of the mill.

Q. Well, now, then your assumption in making these exhibits which you have come forward with affecting the profits are on the basis that after

(Testimony of Joseph Rosenthal.)

these items that are being depreciated have been depreciated for tax purposes over the five-year period, that then they have no further utility at all, is that right?

A. I made no computation of depreciation for tax purposes, Mr. Romley.

Q. Where did you get the information upon which you are depreciating the saw mill there over the period of five years?

A. Your exhibit—

Q. You show me where on my exhibit that appears? I think you are referring to Number 12, are you not? No, it's number 11. Show me where the saw mill is being depreciated over five years?

A. The saw mill is one of the items in the column headed: "15 percent salvage." The total of that column is \$403,000, which includes the saw mill for 176,000. You made provision for salvage value of \$60,000 on the entire four hundred three, [1,213] and stated that the net depreciable balance, which means the amount to be absorbed in operations as depreciation, amounts to \$342,000.

A portion of that, the allocable portion is for the saw mill, since the net depreciable balance of this type of asset, which is the fixed asset, not the movable equipment as I said yesterday. Since this type of asset is to be depreciated over the period of time that it is going to be used in that mill, and in my assumptions we assume that the mill would run for five years at thirty million feet a year.

(Testimony of Joseph Rosenthal.)

Then this \$342,000 should properly be depreciated over that one hundred fifty million feet, and in this computation my own personal opinion is that it should be depreciated not over the one hundred fifty million feet, but in the same manner as Nagel computes its depreciation on its own books, over the roughly one hundred million feet that's under contract.

Q. Now, let me see if I understand you correctly, Mr. Rosenthal. Are you saying that Exhibit 11 shows that the saw mill, as you read it, is being depreciated over a period of five years?

A. No, this doesn't show over what period it is being depreciated in so many words, but it does show that the saw mill is being depreciated over the number of feet that you are using as the factor or the ingredient in determining the amount of depreciation to be taken. [1,214]

Q. And that's 266,500,000, isn't it?

A. That's right, you have depreciation—

Q. And is that to be produced in the five years?

A. No, sir.

Q. Is it to be produced in the fifteen years?

A. I don't know.

Q. Will you look at another exhibit?

A. Your schedule says—your schedule shows a computation of 266,000,000 feet which, for your purposes you have computed as being the total expected production. I have ignored that and, on

(Testimony of Joseph Rosenthal.)

the instructions from counsel, I have made computations in exactly the same way that you made them here, but drew a line after the thirty million dollar group and came up with a total of one hundred fifty million feet instead of two hundred sixty-six million feet, and then made the computations in exactly the same way even though, in my own opinion, I thought that the one hundred fifty million feet was excessive and my opinion corresponds with the opinion as expressed by Nagel in its ledgers and its reports, and I assume in its tax returns, that the depreciation, this depreciable amount, if applied to the way Nagel did it, this three hundred forty-two thousand would not even have gone as high as on the one hundred fifty million feet. Certainly not as high as the two hundred sixty-six million, but would have been limited to the one hundred ten million feet and possibly even under that. [1,215]

Q. Let's go back to this Exhibit 11, sir. You see here at the bottom depreciation spread over total projected production of 266,565,000 feet?

A. Yes, sir.

Q. Doesn't that show to you that, when considered in connection with the saw mill item above that we do not show any replacement for, that it's being spread out over that production?

A. Mr. Romley,——

Q. Now, please, can you answer me directly without a speech?

(Testimony of Joseph Rosenthal.)

A. I can't answer that yes or no, sir.

Q. All right.

A. This shows that it is not spread out like the rolling equipment, so much a year regardless of production. This not spread out on an annual basis over fifteen years equally. This is spread out on the unit of production method, and it encompasses a computation of what the depreciation would be and if you will take your computation, one of these computations, this 342,000,000—I'm sorry, \$342,000 is spread out not on the basis of time, but rather in your own computation on the basis of units to be produced.

Q. Now, sir, do you have any idea as to how, what was the —do you have any idea as to the value in November, 1958, of the saw mill? [1216]

A. None whatsoever.

Q. Do you have any idea as to whether that can be used for the fifteen years referred to in the evidence of the plaintiffs in this case?

A. I have no information on that subject at all.

Q. And if I were to ask you the same questions with regard to these other items as to whether—as to how long they will last, you'd be unable to answer them, is that right?

A. In a broad, general way I could say that some of the lives given to the equipment there, if you are going to spread it on a fifteen-year basis, that some of the lives exceed the lives recommended

(Testimony of Joseph Rosenthal.)

in bulletin F, and it's common knowledge among practitioners that the lives as shown in bulletin F are high lives provided to the revenue agents so they can reach settlements with tax payers on depreciation rates.

Q. Does bulletin F refer to machinery and saw mill equipment or only to office equipment?

A. Both.

Q. Does it include lumber—I mean lumber mills, saw mills, planing mills? A. Yes, sir.

Q. And that recommendation in bulletin F is for—represents the period of time over which the Government will recognize the depreciation of a given item, either on a unit basis or on an annual basis, is that right? [1217]

A. No, bulletin F does not refer to a unit basis.

Q. Entirely on an annual basis?

A. Entirely on an annual basis, yes, sir.

Q. Now, are you implying or meaning to imply by your testimony, sir, that once any of these items have been fully depreciated in accordance with bulletin F, or in any way, that thereafter they have no utility whatsoever?

A. No, sir, I didn't say that at all.

Q. So if this saw mill were depreciated—do you know that the saw mill is being depreciated by Duke City over a unit production of ninety million feet?

A. I assume that.

Q. And do you assume that that will be accomplished within a period of three or three and a half years, thereabouts?

(Testimony of Joseph Rosenthal.)

A. I would assume that. In my computation I made, one of those figures—I believe I took—I have one figure there, three and a-third years and one three and two-thirds. It's approximately that period of time.

Q. Now, you are not expressing an opinion that after that three, three and one-third or three and two-thirds years, that the planing mill has no further utility?

A. No, on the contrary I think that it would be physically able to produce under the normal circumstances but that isn't the way depreciation is computed.

Q. No, that isn't the way depreciation is computed, let [1218] us say, but however do you recognize that after the depreciation has been taken out on the saw mill in the three, three and a-third or three and two-thirds years, that thereafter the net profit of the operation is going to increase because of the fact that the saw mill has been depreciated out?

A. I don't think that's a correct statement at all. You are assuming, when you say the net profit is going to increase, that there is a net profit to start with. There may be a net profit, there may be a loss. And the elimination of the depreciation might merely be a diminution in the loss.

Q. Well, let me ask you this, sir: If we are to assume that the operation would show a profit, and

(Testimony of Joseph Rosenthal.)

if we are to assume further that an item of \$176,000, a saw mill is depreciated out in three and a-half or four years even, and if we are to assume that an operation continues in the same manner to show a profit, is not the profit going then to be greater after this has been fully depreciated out?

A. If you make all of those assumptions, the answer would be correct, provided you also made provision for replacements which would also have to be depreciated.

Q. Now, do you know what replacement will be necessary in connection with the saw mill?

A. No, sir, only what I have heard in this testimony.

Q. You know that there are overhauls and repairs made on all equipment, you assume that?

A. I am not referring to that, I am talking to the type of replacements which are capitalized, things like the kiln, things like that new planer, that stacker. I am talking about only those things which in their ordinary course are capitalized. I know that there was some rolling equipment that was purchased, just what the details are I don't know. But I'm referring, Mr. Romley, only to the things which are capitalized and not to the items which are expensed.

Q. You said, "I know there was some rolling equipment that was purchased." What is that?

A. I know because I was told.

(Testimony of Joseph Rosenthal.)

Q. What rolling equipment was purchased?

A. I don't remember what it was, but I assure you, Mr. Romley, that I have been told that since the acquisition by Duke City, they have replaced some rolling equipment.

Q. Aren't you confusing it with the projection of Mr. Weinstein as to the rolling equipment that they would have to purchase?

A. I don't think so.

Q. If they continued hauling?

A. I don't think so, I think I was told that they did purchase some in addition to what they are going to purchase. I am pretty sure that I was told that.

Q. Now, with regard to the stacker that was purchased, I don't recall its price. Do you, sir? [1220]

A. No, sir.

Q. Do you remember the testimony to the effect that it was—its net effect was that there would be less man hours spent in doing the stacking of the lumber, that this would take care of it?

A. Yes, sir.

Q. Is it reasonable to assume that premise, sir, that other operational costs are decreased?

A. Yes, sir.

Q. Did anyone ever say to you, or has it ever been said to you by Mr. Liberman or anyone connected with him how much manpower would be saved by the use of that stacker?

A. No, sir, not to me.

(Testimony of Joseph Rosenthal.)

Q. Never heard Mr. Weinstein refer to the fact that that stacker would pay for itself in ten months?

A. No, sir.

Q. Or how many men it would replace?

A. No, sir.

Q. If we can boil it down, or summarize it, sir, is this a fair statement: That the depreciation taken for income tax purposes, and that's substantially what has been done on these exhibits, is that right?

A. No, sir. When you say the exhibits, your exhibit that you prepared or mine?

Q. The exhibit and yours, both. [1221]

A. No, sir, they have nothing to do with the depreciation taken for income tax purposes, they were your computations.

Q. Well, they weren't my computations on five years on the saw mill or on the planing mill or the lumber shed or on the bunk house, were they?

A. They were your computations on the total amount of depreciable balance spread over the number of units that you computed, and all I did is took a different number of units over which to spread them.

Q. Where did you get that different number of units?

A. The different number of units? From your computations, the first three.

Q. You mean you just took the first five years?

A. The first five years, yes, sir.

Q. Projected at thirty million a year?

(Testimony of Joseph Rosenthal.)

A. Yes, sir, in one of the schedules. In a different schedule which I believe has been introduced in evidence I took the timber under contract, which is somewhat less than that.

Q. Well, now, you know that a lumber mill is not bought with the idea on the part of the purchaser, here Mr. Liberman, that he is going to be able to manufacture only the timber under contract. You know that, don't you?

A. I know that a lot of things are discussed, I know that Mr. Liberman and I discussed that, and as far as he was [1222] concerned he was ready to buy that mill just to cut the timber that he had if he had to.

Q. He was willing to buy that mill, pay \$650,000 for it in order to cut fifty million feet of timber, is that what you are telling me?

A. No, sir, ninety million feet, Mr. Romley.

Q. Where did he have ninety million feet to cut at that time?

A. Prior to the purchase of the mill he didn't, but at the same time, in the same instant, in the same agreement that he bought the mill for \$650,000 he acquired additional timber as part of that same purchase agreement. When added to the timber he had in Aztec, he had some sixty million feet up in the Aztec, and some thirty-four million that he acquired from Gallagher at the time he purchased the mill, which is ninety-four million which I computed to—taking your figures, without admitting they are correct, on overrun—to one hundred

(Testimony of Joseph Rosenthal.)

ten million feet. That's just another computation, but we always speak of it in terms of timber, or not in terms of lumber or footage. So that he had some ninety-some odd million feet of timber over which to ammortize the cost of that mill. [1223]

Q. You say that figure that I had for overrun, do you know what the overrun was last year for Duke City? A. In the Winslow mill?

Q. Yes, sir.

A. I have been told.

Q. 14.6 per cent, wasn't it?

A. That is what I have been told.

Q. By Mr. Liberman?

A. By Mr. Cavanaugh.

Q. Mr. Cavanaugh? A. Yes.

Q. So would you agree then, sir, that the projection we make of 15 per cent, in light of the testimony, it runs nationally on an average, or the West Coast, I should say, 15 to 20 per cent is a conservative one?

A. On the contrary, I would say it is an exaggerated one.

Q. In the experience that Duke City had itself last year?

A. I don't want to say for the West Coast, but I would rather say for Duke City's own operation at Winslow, because I believe in order to get a fair picture of overrun, the longer the period you take the more accurate your figures are and the figures for the year preceding this, the same man who told me it was 14.6 for this year told me there was

(Testimony of Joseph Rosenthal.)

a loss of nine-tenths of a per cent for the preceding year. [1224] If I were using my judgment I would take the two year period, get a weighted average and come up with something like six per cent, something like that. That is what I would do if I were making a computation.

Q. You think it is better to take a longer period of time?

A. For the purpose of determining overrun, provided that conditions are substantially the same. If you ran into a period where the conditions are materially different, then it would be wrong to take a long period of time. You must take conditions that are comparable.

Q. In your opinion, sir, in order to compute earnings should you take a longer period of time?

A. You must take a longer period than one year. You must take not too short a period and not too long a period and in the largest number of valuation cases that I know anything about, from reading and being personally familiar with, the general average that is taken is a five year period. And that is the same period that was taken by the Nagels, when it was necessary for them to determine earnings, average annual earnings for the purpose of valuation, they took a five year period.

Q. You changed their nine year period which they presented? A. Yes, sir.

Q. To a five year period? [1225]

(Testimony of Joseph Rosenthal.)

A. Yes, sir.

Q. In that five year period you have a fire which is the largest of its kind in the history of sixty years up there?

A. That is the same period that fire was included, in the five year period that Nagel took, if I remember correctly.

Q. Getting back to where we were a moment ago. In New York was it that you talked to Mr. Liberman about the amount of timber that he expected to mill?

A. I am afraid I don't understand your question.

Q. Was it in New York that you talked to Mr. Liberman and he told you in regard to the amount of timber, this 90 million feet he was going to mill through the plant?

A. I am sure we must have.

Q. I thought you said awhile ago you did? You did not say it was in New York, but that you talked to him.

A. We did talk about it and I am sure we talked about it in New York.

Q. He asked your advice with regard to purchasing that mill, as a financial advisor?

A. Mr. Liberman doesn't ask my advice on whether the price is right or wrong.

Q. Answer my question. Did he or didn't he?

A. On some phases, yes.

Q. Did he ask your advice with regard to the acquisition of the Gallagher properties? [1226]

(Testimony of Joseph Rosenthal.)

A. On some points of it, yes.

Q. Did he during that period of discussion tell you how much timber he expected he could mill through this property of the Gallaghers?

A. Our conversation was about the 90 million feet.

Q. Did you say to him that would be a sufficient amount of timber, sufficient in your opinion to justify an investment of \$650,000?

A. I think his opinion on that is far better than mine. That isn't the kind of thing that he would lean on me for advice.

Q. When you were talking about that did you know how future timber might be acquired?

A. Yes, sir.

Q. Through it being presented for bids by the U. S. Forest Service?

A. Yes, sir.

Q. Did he tell you at that time that he expected not only to mill this 90 million feet, but expected he would be a successful bidder on some of this forest timber?

A. That we would be a bidder, I am sure we said he would be successful; he hoped; but previous experiences with him, I know he is not always a successful bidder on timber on which he bids.

Q. None of us are always successful bidder on everything [1227] we bid, are we?

A. That is correct.

Q. Did he in those discussions say to you: There will be some more timber coming up for sale. In

(Testimony of Joseph Rosenthal.)

my judgment I think I can get more to mill than the 90 million existing feet?

A. I doubt very much if we discussed that. We had too many other things to discuss at the time.

Q. When did he first talk to you about the possible acquisition of the Gallagher properties?

A. The first record of which I have definite knowledge is September 11, 1958.

Q. Did he call you long distance at that time?

A. Yes, sir.

Q. Did he tell you he had a meeting with Mr. Gallagher and was negotiating for the purchase?

A. Yes, sir.

Q. And did he ask your advice?

A. I think it was more to report to me to keep me informed what was going on. We probably spoke about a number of things and included that in the conversation. That would be the normal approach of things. I don't think it was for the purpose of asking for advice in the way you mean it, Mr. Romley. When we talk about things, we talk like a man and his advisor and I suppose you could construe it as asking [1228] for some advice.

Q. If he didn't at that time, did he later ask for your advice in connection with that transaction?

A. Yes, sir.

Q. When?

A. I am not clear as to the period between September 11 and October 12. He may or may not have.

(Testimony of Joseph Rosenthal.)

My mind is just a blank on that period. But certainly on October 12th.

Q. What time did you meet him?

A. It was in the early evening, I would judge somewhere around eight o'clock, somewhere, something like that.

Q. Discuss it that night?

A. I am sure we must have discussed it on the way driving him in to the hotel.

Q. Did you spend that night with him at the Essex House? A. No, sir.

Q. How long did you remain with him that night to discuss matters with him?

A. I don't recall, but it was not one of those extended visits.

Q. At that time did he ask your advice with regard to purchasing the property?

A. At that time, Mr. Romley, he had no contract or anything for it, because it was in a very hectic situation is probably a mild way to describe it. And we discussed various [1229] phases of it.

Q. Will you please answer my question?

A. I don't know how I could answer your question in a yes or no answer.

Q. At that time did he ask your advice with regard to the purchase of this property?

A. I would rather say the answer is yes—

Q. Don't rather say anything. If you know, tell us yes or no, if you don't know say you don't know.

(Testimony of Joseph Rosenthal.)

A. Mr. Romley, the principal purpose of his visit there at that time was to straighten out another matter. In the background of straightening out that other matter was the question of purchasing the mill.

Q. Mr. Rosenthal, at that time did he ask your advice in regard to purchasing the property?

Mr. Moore: We object to the reiteration. I think the witness has answered it as fully as he can on a yes or no basis.

The Court: I think he has answered.

Q. (By Mr. Romley): Mr. Rosenthal, did you ever advise him with regard to the purchase of this mill?

A. As to certain phases of it, yes.

Q. Did you ever make any projections with him or talking to him with regard to whether it would be a profitable venture? [1230] A. No, sir.

Q. Did you ever recommend he purchase it or recommend to the contrary?

A. I made no recommendation, I wouldn't do that. My consultations were in connection with financial requirements, and also the manner in which it was to be acquired.

Q. What were your discussions with regard to financial requirements?

A. As to how much money it would take to run the mill, to acquire and run it.

Q. Was he in a financial position to do that?

A. That would depend upon the terms.

(Testimony of Joseph Rosenthal.)

Q. Was he in a financial condition to do it on the terms it was acquired? A. Yes, sir.

Q. You knew that from all your dealings with him? A. Yes, sir.

Q. What is your definition, sir, of operating capital?

A. Operating capital is the amount of money which must be used in the operation of a business over and above the amount required for fixed assets.

Q. And what items are included in that? It is not just cash, is it? A. No, sir.

Q. What are the items included in that category? [1231]

A. A reasonable amount of cash with which to operate accounts receivable to be carried for the sale of materials, inventory and prepaid expenses in the usual case, or particularly as applied to this case.

Q. Do you know how much operating cash would be required in this case?

A. In the case of this Winslow mill?

Q. Yes.

A. I would say somewhere between 50 and \$100,000 as a normal working balance.

Q. Every business that you ever had anything to do with always had some accounts receivable on the books, does it not?

A. I know some that don't.

Q. Every successful business does?

(Testimony of Joseph Rosenthal.)

A. No. Macy's sells for cash only.

Q. You are one ahead of me. I didn't know that. Most successful business concerns that do business on a credit basis always have accounts receivable, do they not? A. Yes, sir.

Q. And the amount is largely dependent upon the total volume of business done on a credit basis, isn't that true?

A. That is one of the ingredients.

Q. One of the major ones?

A. That is a major ingredient, one of the major ingredients, yes. [1232]

Q. What other major ingredient is there?

A. The length of time that customers take to pay their bills. A business with a large volume might have smaller accounts receivable than the business with a small volume. It is the large volume business people pay in ten days and the small business they pay in 90 days.

Q. Have you in any part of this Exhibit P in evidence doubled up on an interest items that you know of? A. Not intentionally, sir.

Q. Mr. Rosenthal, is it your opinion that the projected profits of the Duke City operation in Winslow during the first five years following December 1, 1958, would result in a total net profit, the total of only \$149,659?

A. I expressed no such opinion.

Q. Do you have any opinion? A. No, sir.

(Testimony of Joseph Rosenthal.)

Q. You are not then representing that this figure of 149,659 appearing on the last page of Exhibit P is all that the net profit will be realized?

A. I am not stating whether there will be a profit or loss. What I computed there is what the profit would be if it were based on the average profit of the Nagel operation as submitted by you, multiplied by the various amounts and factors shown on that. I expressed no opinion what the profits will [1,233] be in the future, Mr. Romley.

Q. Did you on that expression, based on the fact, did you know that the operating profit of Nagels in 1958 was \$149,000 plus?

A. You are talking about numbers that I know nothing about. If you will show me a copy of the exhibits I will be glad to discuss it with you.

Q. That is Exhibit 7-H on page 3. The operating profit, \$149,739.39

A. Before provision for interest and bad debts?

Q. And after all provision and all income of \$167,000 plus, is that right?

A. Before other deductions, not after deductions for interest, Mr. Romley.

Q. There is an interest item there.

A. I am sorry, there is not.

Q. \$12,479.69?

A. That is below the 176,000 you mentioned, Mr. Romley. You must deduct that from the 167,000 you mentioned.

(Testimony of Joseph Rosenthal.)

Q. I beg your pardon, you are correct. It is 146,247 after that deduction?

A. Yes, sir, but that includes other income of which I have no knowledge and other deductions. That is very close to the 149,000. The operating profit was 149,000 and the bottom figure is 146,000. [1,234]

Q. Do you know how much the net income was from Duke City for this last year's operation on [1,234] the Winslow plant?

A. No, sir, I do not.

Q. Have you ever heard any figures from which that could be computed? A. No, sir.

Q. Are you sure about that?

A. Their actual net profit?

Q. Yes. A. Yes, I am sure of that.

Q. You helped prepare these schedules. Let's take a look at them.

A. May I correct that.

Q. To conform to those schedules, you mean?

A. In connection with the preparation of the answers to Interrogatory No. 40, certain figures were extracted by Mr. Cavanaugh in the best way he could and certain adjustments were made to those figures to give effect to a determination of net profit as I would prepare it if I were asked to determine what the net profits would be on the operations of the Winslow mill, giving effect to those things which ordinarily are not given effect

(Testimony of Joseph Rosenthal.)

to on the books of account themselves but which should be given effect to in a computation of this type.

Q. So the amount of net profit was discussed in your presence that Duke City made in the thirteen months period [1,235] ending December 31, 1959, do you remember?

A. No, I don't remember, but it would be the profit shown on there minus those things which are computed items of cost, like interest and things of that sort. Obviously they did not pay the amount of interest shown on that statement.

Q. On Schedule answering Interrogatory 40, originally it reported the profit per thousand of the Winslow operation from acquisition of December 31, 1959, the amount of 6.58 per thousand, isn't that right?

A. Yes, sir.

Q. That was to be spread over how much lumber, do you recall?

A. No, I don't.

Q. Something over 23 million feet of lumber shipped, was it?

A. In that area.

Q. And that would have amounted to something in excess of 149,000 that you show for five years, is that right?

A. Which 149,000 are you referring to?

Q. I referred to earlier in your Exhibit P as the five year, page 4.

A. This is the wrong page and wrong item you are showing me.

(Testimony of Joseph Rosenthal.)

Q. It is the fourth page, the last page of Exhibit P.

A. If I may, you want to refer to the third page. That [1,236] is the figure you are asking me for.

Q. Didn't I examine you awhile ago on the figure of 149,000 that appears on the last page?

A. Mr. Romley, the figure you are now pointing at is merely the amount of interest which is applicable to the operation. I believe the figure you want is on the preceding page.

Q. How much is that?

A. That is 158,000, higher than the one you mentioned, but that is the one you are asking for.

Q. That figure you project on the third page, it is, of Exhibit P, 158,000 is for a five year period, is it not?

A. Of Nagels operation.

Q. 158,000, five years of Nagels operation, and here in one year you have net earnings of 141,715.37 for the year 1959?

A. Those are prepared on entirely different methods of computation. In my judgment the 158,000 figure mentioned on the page you are speaking about is the correct way to make the computation and give effect to those things I am referring to. The simplest illustration, Mr. Romley is the question that you asked me about depreciation. You asked me if it isn't true that when an asset is fully depreciated and is still being used, doesn't the profit

(Testimony of Joseph Rosenthal.)

go up? Sure it does. In the Nagel statements the assets that have been fully [1,237] depreciated were still in use during 1959 and therefore there is no provision for depreciation in the 1959 Nagel operation of the assets still being used by Nagel. Whereas, in the computations that you prepared under Exhibit 11, you substituted for Nagel's depreciation, which included, as I said, fully depreciated assets, so there is no amount, you substituted the depreciation on the purchase price of \$650,000. That calls for a totally different kind of computation for depreciation. There are other things in the same way. [1,238]

Q. (By Mr. Romley): Let me ask you, sir, with regard to the item of interest which you have deducted at 6 percent on the \$650,000, and 6 percent on the 405,000 declining balances, and maybe that's all—there may be another item but not of great consequence. I suppose in your practice you have prepared several reports similar in a general way to those that comprise Exhibit 7, is that right?

A. Is this Exhibit 7?

Q. Yes. A. Yes, sir.

Q. Extending over a period since 1922?

A. Yes, sir, and even before that.

Q. That undoubtedly would run into several hundred or several thousand?

A. That's a reasonable statement.

Q. In how many of those reports have you shown what you have shown in P?

(Testimony of Joseph Rosenthal.)

A. In the type of report in Exhibit 7 the percentage would be relatively small. But Exhibit 7 is not what we have in these other exhibits, they are prepared for a totally different purpose. These are referred to as financial reports.

Q. Well, does Exhibit 7 show the net profits realized from the operation of the Nagel Lumber & Timber Company during each of those [1,239] years?

A. For the purpose for which they would be prepared, I would say yes.

Q. They weren't prepared for the purpose of this lawsuit in mind, they were all made up long ago with the exception of the last one which was made up this year? A. I agree.

Q. The year of '59?

A. I agree with that, and I believe the one for 1959 was also made up without regard to the lawsuit.

Q. Well, do you agree that the net profits realized from the operation of the Nagel Lumber & Timber Company are as reflected in series 7?

A. It is unfair to ask me that question because we get back again now to this question of what is the word "examine" and how am I in a position to state whether that is fair? I believe that they were prepared correctly, at least in the later years. In the earlier years the accountants who prepared

(Testimony of Joseph Rosenthal.)

the statements specifically, they themselves who prepared them disclaimed any knowledge of the accuracy of them, and you want me to state that I think they are correct, Mr. Romley?

Q. Well, let's take the years that they have expressed a definite opinion on, that is because they hadn't taken the inventory in the early years?

A. There is one year in which an opinion is expressed that I believe the accountant probably, through oversight, [1,240] expressed the opinion when they shouldn't. In the later years, their opinion is correctly expressed.

Q. In other words, you are not challenging the fact that the net profits earned in the Nagel mill during these certified years, if I may use that term, are as shown in series 7, is that correct?

A. With one exception, it is correct, as to one of the years I believe the accountants are unable to properly certify that statement. But I am not admitting that it's correct, I am not challenging it. I don't know, Mr. Romley. I just read it.

Q. And you don't mean by your testimony here to challenge any of the profits reflected in all of these series, whether they are certified or not?

A. That is correct.

Q. As representing the net profits from the operation of the business? A. That is correct.

Q. You are not challenging that?

A. I am not challenging them.

Mr. Romley: That's all, sir.

(Testimony of Joseph Rosenthal.)

A. (Continuing): I used them in the preparation of the exhibit.

Mr. Romley: That's all.

Mr. Moore: Your Honor, I can't finish. [1,241]

The Court: Very well, we will recess until 1:30.

(Whereupon, a recess was taken from approximately 12 o'clock noon until approximately 1:30 o'clock p.m.) [1,242]

1:30 o'clock p.m.

JOSEPH ROSENTHAL

resumed the witness stand and testified further as follows:

Redirect Examination—(Continued)

By Mr. Moore:

Q. Mr. Rosenthal, Mr. Romley questioned you concerning the charging off in the exhibit of the sum of \$833 per month paid to a former partner, a Mr. Warren. Are you familiar with that transaction?

A. Yes, sir.

Q. And you told Mr. Romley you believed that is the proper charge as it appeared in that exhibit?

A. Yes, sir.

Q. Tell us why?

Mr. Romley: Your Honor, I think yesterday we had an objection from counsel that the exhibit is the best evidence. I think I am entitled to see it and I could cross examine if he could refer to it.

(Testimony of Joseph Rosenthal.)

Mr. Moore: I am not referring to the agreement, I am asking the gentleman to explain the answer. He told Mr. Romley that was proper and he had a reason and could explain it. Mr. Romley didn't ask him, I am now asking him to explain it. [1,243]

The Court: Very well.

A. A payment under an agreement not to compete is made by businessmen for the purpose indicated in the words themselves, to make sure that the individual to whom this sum is paid will not compete, usually during a fixed period of time. The purpose of that payment is to make it possible for the individual making the payment to have the comfort of knowing that during the existence of that agreement he is not going to have any competition from that individual, either in sales or employees or buying the business, something of that sort.

Q. (By Mr. Moore): Let me ask you this—

The Court: Mr. Moore, that answer assumes that is what this payment is for.

Mr. Moore: That was what I was going to ask him and if he has personal knowledge of it.

The Court: Has personal knowledge from the contract?

Mr. Moore: No, I will show.

Q. (By Mr. Moore): Mr. Rosenthal, did you participate in the negotiations with Warren when that payment was set up?

(Testimony of Joseph Rosenthal.)

A. I personally negotiated it.

Q. You negotiated it yourself?

A. Yes, sir.

Q. Let me ask you this, was that a payment of money for an agreement not to compete? [1,244]

A. In the lumber business.

Mr. Romley: We object as not the best evidence, your Honor. I think we are entitled to see the agreement.

The Court: I don't think it will help very much because the answer that was given over the objection was, "in the lumber business." Of course, if it was in the lumber business and all over the United States it probably isn't any good anyway.

Mr. Moore: I will ask him an additional question, not to compete where.

The Court: That is what we are getting into. We are getting into the terms of the agreement. Do you have the agreement?

Mr. Moore: I don't think we have that agreement. We didn't anticipate that would come up, your Honor, and we don't have it. But this witness personally negotiated it himself, has knowledge of what it was, has knowledge of what the payments are and I am simply offering it to explain his answer because Mr. Romley questioned him at length whether that was a proper charge as shown on these exhibits. I believe we are entitled to offer it to complete the

(Testimony of Joseph Rosenthal.)

explanation. That is the purpose of the offer, is to explain this man's reasons why he would consider that a proper charge against the operation of Duke City Lumber Company business. Your Honor, if I may move on and if we find it, I will come [1,245] back to this subject.

The Court: Very well.

Q. (By Mr. Moore): Let me direct your attention, Mr. Rosenthal, to the accountant's report of Nagel Lumber & Timber Company for the year ending December 31, 1959. That must be Exhibit 7-I. Turn to page—looks like 1959-10, entitled: Disposition of funds provided from operations and other sources.

A. Yes, sir.

Q. Do you find on that page: Amortization, non-competitive agreement \$50?

A. Yes, sir.

Q. From that report as you exhibit it, was that charged up as operating expense?

A. Yes, sir.

Q. Now, Mr. Rosenthal, while you have that exhibit, turn to page 1959-4.

A. Yes, sir.

Q. Under: Other income.

A. Yes, sir.

Q. Gain on sale of assets 38,000 plus.

A. Yes, sir.

Q. Will you explain what you mean, explain your meaning of what you told Mr. Romley about that figure this morning?

Mr. Romley: I think that is clear what he said, [1,246] recognize the sale of some item that had been depreciated, sold it for more than its depreciation.

(Testimony of Joseph Rosenthal.)

The Court: He may answer.

A. Mr. Romley asked me why I did not include this item in income in my reconstruction of their exhibits in the same manner that I reconstruct their exhibits by a deduction for interest. I stated that I thought that item of gain on sale of assets should not be included in income. A gain on the sale of assets which relates to the lumber business is properly includable in the income even though it is shown as other income, but still belongs in the profit of that operation is well indicated by the answer to Interrogatory No. 40 where Duke City itself included gain on the sale of assets as an item of income in computing its own profit in answer to the Interrogatory No. 40. However, in determining the net income based on the exhibits submitted and which I prepared from those exhibits 9 to 13, I excluded the same item for this reason. As I explained, the gain on the sale of the assets is the, shall I say profit realized on the sale of those assets after applying the depreciated cost. If the depreciation taken hasn't been enough to bring the asset down to a value below the price for which it is sold, then obviously when you make a profit on that sale, that profit has the effect of either reducing the depreciation or correspondingly becoming an item of income in that period. In the [1,247] particular case here, and this brings out what I've been trying to say, that the preparation of the statement for one purpose has nothing to do with another. In this particular case what did I start with. I took Mr.

(Testimony of Joseph Rosenthal.)

Romley's exhibit which showed the operating profit before depreciation. There was no depreciation computed in the exhibit that Mr. Romley prepared. Therefore any gain resulting from the sale of a depreciated asset does not offset an item taken as a deduction. The depreciation shown in Mr. Romley's exhibit was Duke City's depreciation, which has nothing to do with Nagels' depreciation.

Q. Explain how this appears in this exhibit, this 38,000, how that was carried in this report?

A. In this report it is included as an item of other income, in this report.

Q. Yes.

A. But in the report I prepared it should not be included as income since the depreciation which gave rise to this profit was not shown as a deduction by Mr. Romley, then the gain of sale of assets should not be shown as income or reduction of depreciation.

Mr. Moore: Your Honor, we do not have that agreement we were talking about with respect to the payment for non-competitive covenant.

Do I understand, Mr. Rosenthal, that you personally [1,248] negotiated that matter with Mr. Warren on behalf of Mr. Liberman?

A. Yes, Mr. Moore.

Q. And what were those payments of \$833 a month for?

A. Those were——

Mr. Romley: It has been asked and answered.

The Court: No, he may answer.

(Testimony of Joseph Rosenthal.)

A. Those were to prevent Mr. Warren from engaging in any phase of the lumber business within a certain area, the extent of which I am not sure, except that Judge Johnson and I worked out that area. We wanted to make that area as broad as we could.

Q. (By Mr. Moore): Did it include Arizona?

A. I can't recall, but it certainly included Albuquerque and since Albuquerque is an integral part of the operation we are talking about I'm sure it included Albuquerque.

Q. Is that the reason you say that should be charged in the manner in which it did appear on that exhibit?

A. Yes, because it prevents Mr. Warren from doing any phase of the lumber business, surely in Albuquerque.

Mr. Romley: I move to strike it, your Honor, as having no probative value because we are talking about a single operation by these joint ventures in Arizona.

The Court: As far as it appears it does not apply to Arizona. [1,249]

Mr. Moore: The exhibit, if the Court please, was prepared on their entire operation and then allocated, as the witnesses have explained. Of course that exhibit has not been offered in evidence yet. We have had lots of testimony about it. I will cover the Arizona feature of it with his Honor. I will pass on to another subject.

(Testimony of Joseph Rosenthal.)

The Court: You say the exhibit has not been offered?

Mr. Moore: The schedule answering Interrogatory No. 40 I don't think has been offered in evidence.

The Court: The witness has been examined with regard to it pretty thoroughly.

Mr. Moore: Yes. I say the exhibit itself has not been offered in evidence is my recollection.

The Court: I think not.

Q. (By Mr. Moore): Mr. Rosenthal, Mr. Romley asked you with some particularity about your discussion with Mr. Cavanaugh and with Mr. Liberman and Mr. Edsel regarding the estimate of profit which was shown I believe in Plaintiffs' Exhibit 13, that U & O schedule. What was your discussion with Mr. Cavanaugh?

A. My discussion was limited to that——

Mr. Romley: Just a moment.

Q. (By Mr. Moore): With respect to the \$15 figure?

Mr. Romley: Your Honor, I object to that on the ground it is hearsay. I asked him certain questions with [1,250] regard to that, I don't believe I opened the gate, as Mr. Moore says.

Mr. Moore: I thought you did.

The Court: You asked him something about his discussion with Mr. Cavanaugh.

Mr. Romley: Mr. Cavanaugh didn't say certain things.

(Testimony of Joseph Rosenthal.)

The Court: You asked him with reference to his discussion as to certain things and he said he didn't discuss that. That was the matter you went back to and asked the answer read back, so you did get into his discussion with Mr. Cavanaugh.

Mr. Moore: I believe my recollection serves me correct that he asked this witness: Did not Mr. Cavanaugh say that this was the profit of Arizona Timber Company.

Mr. Romley: I did ask that question.

Mr. Moore: He went into that figure. I think that makes this admissible.

The Court: Well, I don't know as to that. The answer was no.

Mr. Moore: Then there was a later question about the discussion, who he discussed it with.

The Court: I am with you on that, but the ground that you just mentioned, no, because if a witness says there was no discussion about a certain thing, that does not open up the conversation. [1,251]

Mr. Moore: I agree.

The Court: About the questions about what they did discuss does open it up.

Q. (By Mr. Moore): Do you remember the question, Mr. Rosenthal? A. Yes, sir.

Q. Briefly outline the discussion you had with Mr. Cavanaugh about that figure on that exhibit. [1,252]

A. Mr. Cavanaugh and I discussed that one figure, on the exhibit, and Mr. Cavanaugh told me

(Testimony of Joseph Rosenthal.)

that, when I asked him about that number, he says, "Well, as soon as it was prepared and I took it in to see Mr. Liberman, he immediately said, 'That is twice as much as it should be.'"

And then he took the matter up with Mr. Edsel, the insurance agent, and had discussed it with him and they agreed between them that when the application for the insurance were going to be made that the figure would be adjusted so it would be half of that figure.

Mr. Moore: That's all.

Mr. Romley: May I see that policy you had the other day?

Mr. Moore: I don't have it. Do you have it, Mr. Cavanaugh?

Recross Examination

By Mr. Romley:

Q. This U and O is a term for insurance known as use and occupancy? A. Yes, sir.

Q. It's a payment made by an insurance company, insofar as would be applicable here, for a loss sustained as a result of fire occasioned by a shut-down of operations for a given period of time, isn't that right? [1,253]

A. That's reasonably correct.

Q. And a person may purchase insurance, U and O insurance for anything up to a full 100 percent of his loss, isn't that right?

A. That's my understanding.

(Testimony of Joseph Rosenthal.)

Q. And if he wants to buy insurance for only 25 percent of his loss or for 50 percent of his loss he can do that? A. That's my understanding.

Q. Whether Mr. Liberman just was interested in having the insurance company carry half of the loss and he carry the other half by buying only half of the insurance, you don't know of your own knowledge, do you? A. That is correct.

Q. Now, you are quite sure you had this conversation with Mr. Cavanaugh that you just related? A. Positive.

Q. And Mr. Liberman said, according to Cavanaugh's statement to you that Mr. Liberman says that the \$15.64, I believe that was it, right in that area, is too high, it should be about half of that, is that right? A. Yes, sir.

Q. Half of that would be \$7.82, would it not?

A. Yes, sir.

Q. And the conservative, or the claim we make here is \$8.01, isn't it? [1,254]

A. Which figure are you talking about?

Q. I don't say "we make," because we are not limited to that. The claim we have made or the calculation we have presented in the exhibit is based on \$8.01, is it not?

A. You have the numbers, Mr. Romley, I don't.

Q. On Exhibit 12, projected profit after depreciation, \$8.01. A. Yes, sir.

Q. This figure that you were speaking of, half of that \$15.64, if I'm correct in that, is after depreciation also, isn't it?

(Testimony of Joseph Rosenthal.)

A. The figure that Mr. Liberman mentioned, I don't know what he did.

Q. No, just please answer my question.

A. If you ask me about the number on that schedule—would you please frame your question again so I make sure I understand, Mr. Romley.

Q. Let's take a look at that Exhibit 15 again, sir.

A. Yes, sir.

Q. That is that U and O exhibit?

A. Yes, sir.

Q. That showed a net profit of \$15.63, I was one cent off in my calculation.

Mr. Moore: I object to the use of the term "that showed a net profit." [1,255]

Mr. Romley: That states a net profit.

Mr. Moore: I must state to the Court that is purely an estimate.

The Court: The Court is aware of that, Mr. Moore.

Q. (By Mr. Romley): This figure shown on Exhibit 15 of \$16.63 net profit per thousand is after depreciation, is it not?

A. After depreciation of \$3.90 shown on this exhibit, yes, sir.

Q. That, apparently, was the amount of depreciation being taken, or do you know, by Arizona Timber Company?

A. I believe I know that Arizona Timber Company took a bigger depreciation.

Q. A bigger depreciation?

A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. Than the \$3.90?

A. I believe that's correct.

Q. How do you know that?

A. Because somewhere among the papers that we have been working on there was some indication of the depreciation taken by Arizona Timber Company in connection with the price computed for the depreciation. I believe Mr. Cavanaugh testified to that, that the Arizona Timber Company depreciation was \$150,000 a year and on their records, and for the purpose of computing the charge to be made under the milling [1,256] agreement, Mr. Liberman objected to that amount of depreciation and they reached a horse trade where the depreciation for the purpose of computing the milling contract was cut down to either one hundred twenty or \$130,000, which when divided over thirty million feet would come to the \$4.33.

But that did not affect the depreciation taken by Arizona Timber Company on its books, which still remained at \$5.

Q. Still remained at \$5?

A. Actually more than \$5.

Q. Where did you get that \$5 figure?

A. \$150,000 divided by thirty million feet would be \$5 per thousand.

Q. Where did you get the thirty million feet?

A. They were discussing thirty million feet as the joint production of Arizona Timber Company and Liberman under the milling contract. That whole contract was based on an estimated produc-

(Testimony of Joseph Rosenthal.)

tion of thirty million feet, and if you take the depreciation of \$150,000 and subtract from that 15,000 feet per annum at \$4.33, that leaves the remaining 15,000 at \$5.67. So that Gallagher's depreciation, after being reduced by or the recovery of the \$4.33 actually came to \$5.67 on its fifteen million feet.

Q. That is a surmise on your part, isn't it?

A. The only surmise is that— [1,257]

Q. Please, sir, is it or isn't it?

A. I would like to answer that that the only surmise is the \$150,000 to which Mr. Cavanaugh has testified, that I do not know of my own knowledge. Everything else I do, it's arithmetic.

Q. Well, you heard Mr. Cavanaugh testify with respect to this Winslow U and O statement, Exhibit 15?

A. Yes, sir.

Q. That the only items there that he thought were incorrect of these specifications were the G and A and selling?

A. I heard that.

Q. And the stumpage?

A. I heard that.

Q. Now, you are assuming that, notwithstanding that testimony, there was still another item, namely depreciation that was in error, is that right?

A. I would assume that, yes, sir.

Q. Now, with regard to this \$38,000 in the gain on sale of assets in 1959, page 4, that's 7-I, I believe. That actually represented income to the Arizona Timber Company, did it? To the Nagel Timber Company, did it?

A. Income to the company?

(Testimony of Joseph Rosenthal.)

Q. Yes.

A. That's a capital gain on the sale of the assets which is income if there is a proper deduction for depreciation. [1,258]

Q. Well, is it income whether you consider depreciation or not, sir?

A. To the Nagel Lumber & Timber Company?

Q. That's what I asked you.

A. Yes, sir, it is.

Q. No question about it, is there?

A. No question about it.

Q. Now, that figure could have been taken into account in our projections here if we didn't want to be conservative and showed the larger income than we showed on this exhibit, isn't that right?

A. Not the way you did it, no, sir, Mr. Romley.

Q. Not the way we did it because we were holding it down to the lower figure, weren't we?

A. You were eliminating the depreciation and I don't think you should ask me whether you were holding it down to a lower figure or not. You made the schedules, I didn't. You left out the depreciation, I didn't. Since you left out the depreciation you would have no right to include in income a recovery of that depreciation, which is—that's all the gain on the sale of assets is, is a recovery of depreciation.

Q. Well, it results in the operation making more money that year, money in its pocket?

(Testimony of Joseph Rosenthal.)

A. Money after providing for depreciation or before?

Q. Well, sir, you have that item, let's just, for the [1,259] purpose of illustration, say you have got an item of equipment that costs \$100,000. It has been depreciated down to 25,000?

A. Yes, sir.

Q. And it's sold for \$60,000? A. Yes, sir.

Q. That not infrequently happens, isn't that right? A. Yes, sir.

Q. Okay. Now, in that event there is a gain realized on the sale of \$35,000, isn't there?

A. That is correct, but not the whole net, sir.

Q. Is that \$35,000 income to the company?

A. On the financial statement that is prepared by Peat, Marwick and Mitchell, yes; on the statement which you prepared in Exhibit Number 10, or whatever it is, no.

Q. Let's forget what the Peat, Marwick and Mitchell say and why my exhibit says. Is that income, that \$35,000, or is it not?

A. That's a very difficult question to answer categorically. It's shown as income. There are some people who think it is not income, because all that would be necessary would be to have the Revenue agent come in during 1959, Mr. Romley, reconstruct the depreciation on an examination for years that are not outlawed by the statutes, find that the depreciation claimed on the report, this very ex-

(Testimony of Joseph Rosenthal.)

hibit is excessive, reduce the amount of depreciation and that so-called gain on the sale of assets might have been a loss on the sale of assets.

Q. You are going to assume that the taxpayer took an improper depreciation to answer the question, is that right?

A. All I did is assume that the revenue agent would change it, that doesn't necessarily mean it's improper.

Q. Let's assume he doesn't sir, let's assume the revenue agent in checking over the books concludes that this was an item that cost \$100,000, was properly depreciated down to \$25,000, was sold for \$60,000. Now, did that represent a gain or a loss to Nagel?

A. In a period or—in statements which are prepared where depreciation is claimed as a deduction, it would represent a gain. In statements which are prepared where depreciation is not claimed as a deduction, it would not represent income.

Q. In this instance, what would it be, a gain or a loss?

A. In this, income. These statements were prepared after deducting depreciation and therefore it would be a gain.

Q. It would be a gain in any way you want to treat it, wouldn't it?

A. Provided it's in the statements where depreciation were deducted in determining income.

(Testimony of Joseph Rosenthal.)

Q. Now, with regard to this agreement with Mr. Warren, you say you personally negotiated that? [1,261]

A. Yes, sir.

Q. Do you remember when it was?

A. Yes, sir.

Q. When? A. About 1950.

Q. Well, we have got different dates. We started two or three years ago, five years ago, and now you think it was ten years ago, is that right, sir?

A. Mr. Romley, I never said that I negotiated five years ago.

Q. Not by you, I mean the other witnesses. Did you hear Cavanaugh say—he didn't commit himself, he said, "I think it was two or three years ago," and I think Mr. Grevéy said about five years ago. Did you hear that?

A. I don't recall any of that testimony, no, sir.

Q. In any event your recollection, and you feel reasonably sure that's accurate, was that it was in the year 1950?

A. I'm sure that it was about 1950.

Q. All right, sir. At that time the Duke City Lumber Company was not operating in the Sitgreaves National Forest, was it?

A. It was not.

Q. Nor did it have any operation in or near Winslow, Arizona?

A. I believe that is correct. [1,262]

Q. Or in the State of Arizona?

A. I believe that is correct.

(Testimony of Joseph Rosenthal.)

Q. Now, aren't you sure, sir, that that agreement, then, did not provide for the State of Arizona? A. I'm not sure.

Q. You think it may have?

A. It may have, yes, sir.

Q. Is that the only consideration paid to Mr. Warren for his interest that you would pay him or that Duke City would pay him \$833 a month?

A. That had absolutely nothing whatsoever to do with a payment for him for his interest, absolutely nothing whatever.

Q. Was he paid something more than this \$833 per month? A. For what?

Q. In connection with the settlement as a result of which he no longer remained with Duke City?

A. Mr. Romley, he was paid for his settlement under a formula contained in the agreement, the original, the 1950 date comes about because that agreement was included in the agreement when the partnership was formed, not when it was terminated. And that's why I know it was about 1950, that agreement for payment of a negative covenant was included in the partnership agreement when created, not when terminated.

Q. Well, now, even if it were properly chargeable for tax or other reasons insofar as Duke City is concerned, and in [1,263] its operations in the State of New Mexico, do you know of any reason

(Testimony of Joseph Rosenthal.)

at all, sir, why that would constitute a charge against this operation if Mr. Liberman had gone through with his agreement with Mrs. Nagel?

A. Your question is a little complicated, would you explain it, please?

Mr. Romley: Read it, please.

(Whereupon, the pending question was read by the reporter.)

A. I'm confused about the last part. If it had gone through with this agreement with Mrs. Nagel, I don't understand the connection between your question and that part of it.

Q. (By Mr. Romley): All right. You knew that he had an agreement with Mrs. Nagel, didn't you?

A. Yes, sir.

Q. You knew that under that agreement Mrs. Nagel had an option to acquire a half interest prior to April 30th, 1959?

Mr. Moore: We object to that as calling for a conclusion, construction of the agreement.

The Court: May I hear the question?

(Whereupon, the pending question was read by the reporter.)

Mr. Moore: That's one of the major issues in this lawsuit, if the Court please, is what did they agree to.

The Court: I think the difficulty is whether he knew. [1,264]

Q. (By Mr. Romley): Did Mr. Liberman tell you about his agreement with Mrs. Nagel?

A. Yes, sir.

(Testimony of Joseph Rosenthal.)

Q. And that was either on the 12th of October or prior, you are not quite sure?

A. Around that period, yes, sir.

Q. And did he tell you at that time that under his agreement with Mrs. Nagel that she could acquire a half interest by April 30th, 1959, if he should acquire the property?

A. No, sir.

Q. He didn't tell you that?

A. No, sir.

Q. Did he make any mention at all of a 50-50 interest?

A. Yes, sir.

Q. And did he tell you, when he placed the calls from New York to Mrs. Nagel on October 16th, that he recognized her right under the September 23rd agreement?

A. I don't think he told me specifically, I got my impressions from what he spoke about on the phone. We weren't discussing Mrs. Nagel much, we were discussing the Kaplans and the Gallaghers.

Q. Well, did he tell you that he recognized the right of Mrs. Nagel under the purchase?

A. I don't think he told me that.

Q. Let's look at your deposition, sir. Do you remember [1,265] that being taken here last week?

A. Yes, sir.

Q. Or the week before?

A. Yes, sir.

Q. Page 42, Line 8: Do you remember my asking you this question and your giving this answer:

“Question: Is it a fair statement to say that from everything Mr. Liberman said to you prior to the time he placed that call to Mrs. Nagel, that

(Testimony of Joseph Rosenthal.)

he recognized that Nagels had some rights in connection with this purchase?"

And you answered:

"Yes, sir."

A. Would you read that again?

Mr. Moore: We object to that, your Honor, that's certainly not impeachment of the question that was asked here and the answer given. The question here was did Mr. Liberman tell you that, the question in the deposition, is it a fair statement to say that from everything Mr. Liberman said to you prior to the time that he recognized a right. In other words, that's a conclusion drawn from what Liberman said and does not purport in any manner to cover the direct statements made by Mr. Liberman as the question just put to the witness did.

The Court: It may not be strictly impeachment but I think we are off on a kind of a tangent here. [1,266]

Mr. Moore: Well, I was going to object on that ground too. I think we are getting a little far afield.

The Court: This schedule answering interrogatory 40 is something prepared and filed with the answers to the interrogatories to show, apparently, the profit per thousand of the Winslow operation. Now, you could very well question the witness who says he had a part in the preparation

(Testimony of Joseph Rosenthal.)

of that schedule as to whether that payment to the retired partner is proper in that schedule, but we are now getting into whether we ought to charge it to Mrs. Nagel. And I don't think that has anything to do with it, because it wasn't charged to Mrs. Nagel, didn't purport to be, it was only charged as an expense in the operation of—the actual operation of Duke City at Winslow up to 1959.

Mr. Romley: As I understand this exhibit, your Honor, it came under the item, schedule D, under general and administrative expense, they show a payment to a former partner of \$9,163. And they show the total shipments during that period of 56,944,000, a part of which was twenty-three million, in round figures, of shipments from Winslow.

Therefore they came up with a—they included that item in arriving at an average for general administrative of \$5.34. To that extent then, your Honor, it is being passed on because they are charging G and A expense to Winslow.

The Court: I am not saying you can't quarrel with this, [1,267] but I'm saying that when you hypothesize as being charged to Mrs. Nagel and get into that——

Mr. Romley: It's not the best choice of language, your Honor.

The Court: I think we ought to stay with just this particular schedule. I am interested in one thing, Mr. Rosenthal. You say you are very sure this happened in 1950, on this partner?

(Testimony of Joseph Rosenthal.)

A. I'm sure, Judge, that it happened when the partnership was created, the 1950 is merely a recollection of when the partnership was created. If that is in the record anywhere, then it was at the time the partnership was created.

The Court: Well, was it to pay \$10,000 a year for five years?

A. Yes, sir, after the termination of the partnership.

The Court: Well, how could it have been paid in 1959?

A. Five years beginning, Judge, with the termination of the partnership. The partnership was terminated about 1955 or '56.

The Court: I thought you said '50.

A. No, the partnership was created in 1950, the payment was to be made for five years in the event of a termination of the partnership. There was a provision in the agreement under which, under certain circumstances, Mr. Warren would withdraw from the partnership. Those circumstances came to [1,268] pass about 1960—or I mean 1956 or 1955, I forget the date. The original agreement entered into in 1950, or whenever it was created, provided that upon the happening of such events and Mr. Warren does withdraw from the partnership, then from then on he would receive payments of \$10,000 a year.

The Court: It's cleared up now, I understood you to say that he withdrew in 1950.

(Testimony of Joseph Rosenthal.)

Mr. Romley: That was my understanding.

A. May I correct one statement about this—my knowing about Mrs. Nagel having some 50-50 thing? I hate to see the record incorrect.

Mr. Romley: Well, there is no question now before you unless the Court wants to inquire or counsel.

The Court: Please.

Mr. Romley: I say I am through, if the Court wants to inquire on that point I have no objection.

The Court: No question.

Redirect Examination

Q. (By Mr. Moore): What was it you wanted to correct in your statement, Mr. Rosenthal?

A. I just wanted to say that I do recall that I did know about it before the phone conversations on October the 16th.

Mr. Romley: That's the same thing he said he knew it on the 12th. [1,269]

The Witness: Yes, sir, that is right, that is right.

Mr. Moore: I think that's all.

The Court: Is that all you have, Mr. Romley?

Mr. Romley: Yes, sir.

Mr. Moore: That's all.

BRYAN JOHNSON

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Moore): State your name, please?

A. Bryan Johnson.

Q. Where do you live?

A. Albuquerque, New Mexico.

Q. What is your profession?

A. Attorney at law.

Q. How long have you practiced law in New Mexico? A. Since May of 1926.

Q. Did you practice any place else before that or did you start in New Mexico?

A. I practiced in Colorado for a little over three years.

Q. I don't think it's important but this record is full [1,270] of references to you as Judge Johnson. How did you get that title?

A. Well, I was a District Judge one time and I haven't been able—they still carry it on, they still call you that.

Q. You served a term as District Judge in the State Court, you mean, over at Albuquerque?

A. Yes, sir.

Q. I believe you are the solicitor for the Santa Fe Railroad in New Mexico, is that true?

A. Yes, sir.

(Testimony of Bryan Johnson.)

Q. How long have you represented Mr. Liberman?

A. Oh, sometime in the early — the forties, around the time that he went into that deal with the Southwest to handle lumber in Transit.

Mr. Moore: I don't mean to ask the Court how I should try my case, your Honor, but I don't want to burden the record and take up time, if the Court is clear on this Warren partnership contract, when it was made and terminated and the non-competitive thing.

The Court: Well, you may do anything you desire on it.

Mr. Moore: Well, I just didn't want to be repetitious with it. I could have Judge Johnson explain that. Maybe I should. [1,271]

Q. Judge, briefly explain when the partnership that was just referred to in Mr. Rosenthal's testimony in which a Mr. Warren was involved, was created and what that provided with respect to a covenant not to compete upon termination and what was to be paid?

Mr. Romley: It is understood, your Honor, I make the same objection, hearsay, not the best evidence.

The Court: Very well.

A. The partnership was formed in 1950 by a rather lengthy document, in which Mr. Warren came in with a 20 per cent interest and the orig-

(Testimony of Bryan Johnson.)

inal partners, Mr. Liberman and Joe and Jack Grevey divided up the remaining 80 in the same proportions. In that contract it contained among other things a provision that if the contract should be terminated and Mr. Warren ceased to be a member of that partnership that he would receive a payment of \$50,000 spread over five years as a consideration for his not competing with the remaining partners in the lumber business. It was stated in rather I think general language and would include any areas where they might be possibly competitive. The time Mr. Warren went out was on the end of January, 1956. They had some problems and when they finally settled it up it was at a period when Duke City was already committed in the Aztec deal. In fact, Mr. Warren had done some of the negotiating before the partnership was terminated. [1,272]

Q. The final settlement and termination of that was after Duke City was committed to acquire the Aztec timber we have talked about here that they now have? A. Yes.

Q. Can you tell us whether the covenant not to compete covered the area that Duke City acquired in the Sitgreaves National Forest?

A. All I can say is in my opinion under the original commitment in the 1950 partnership agreement that Mr. Warren would be excluded from competing in Arizona, areas with the Duke City.

Q. Did you prepare this September 23rd letter agreement that we have in this lawsuit?

(Testimony of Bryan Johnson.)

A. No, sir.

Q. Could you have improved upon it had you prepared it? A. Pardon me?

Q. I said could you have improved upon it had you prepared it?

A. It would have been a different agreement, but I am not sure we wouldn't have had a lawsuit. It would have been a different kind of lawsuit anyway.

Mr. Moore: Now, your Honor, in order to save time I do want to say this to the Court. I made an offer of proof with Mr. Joe Grevey with respect to the provision in the November 6th, 1958 contract, the assignability provision, [1,273] upon the condition that Duke City retain control of the management as long as there was any indebtedness. The Court, I believe, excluded that and I made an offer of proof. I can prove the same thing by this witness or make an offer to prove the same thing and shorten the record, to save time, if the Court's ruling will be the same.

The Court: It will be the same.

Q. (By Mr. Moore): We have had testimony with respect to a meeting that occurred in your office, I believe the date was January 6th, 1959, at which time Mrs. Nagel and Mr. Jenkins and I am not sure who all the other parties were. Do you recall that meeting?

A. On January 6th? Yes, sir.

(Testimony of Bryan Johnson.)

Q. Was that the time that the contract of November 6th was delivered to them and they testified they went in your library and read it and came back into your office?

A. Yes. Mrs. Nagel and Mr. Cox, Mr. Jenkins came in and I furnished them a copy of the agreement that had been made under date of November 6th and they went into my library to look it over and were there, I don't know, maybe half an hour or three-quarters, came back after having looked it over.

Q. Tell us what happened when they came back.

A. Well, a lot of things I naturally don't remember. I do remember when they first came in Mrs. Nagel said that [1,274] it looked like a good deal that he had. Then there was discussion back and forth, whether they had a right to come in or not, each side talking about their respective construction of what the agreement meant.

Mr. Romley: May I interpose here and ask Judge Johnson to identify the parties making these statements, particularly with reference to what he last said here? I am not sure I am clear in my understanding of that.

A. The parties mainly talking about it was Mr. Cox, as to what it meant, and myself, and we were the ones mainly doing the talking about what this letter of September 23rd really meant. Getting down to did they have an option they could exercise or didn't, that was what it was about. I don't

(Testimony of Bryan Johnson.)

recall any specific comments that were made by either Mr. Jenkins or Mrs. Nagel. Mr. Liberman however expressed himself.

Q. (By Mr. Moore): What did Mr. Liberman say there, if anything, about what he had told Mrs. Nagel in these telephone calls from New York we have talked about?

A. Well, he stood up and went through all the conversations and got through and said in substance that they had had an opportunity and he didn't feel any obligation in view of the fact that she didn't respond to his telephone calls. He went through the account of the telephone conversations substantially like he has testified about [1,275] here.

Q. Did Mrs. Nagel deny what he said about those conversations, those telephone conversations or make any statement about what he had said?

A. Mrs. Nagel neither denied or confirmed his statements. She said nothing at all, made no comment whatever concerning their telephone conversations.

Q. In that meeting, Judge, you say you had discussed, you and Mr. Cox, the various interpretations of this letter. Was there ever at any time in that meeting an actual offer of performance made saying: We are ready, willing and able?

A. No. The whole thing was an argument, there was discussion and expression of divergent views as to what the option meant. Of course there was

(Testimony of Bryan Johnson.)

nothing said: We want to come in and we have the money, this is the way we would like to come in, or anything like that. Of course in the back of your mind you think they are wanting to come in or they wouldn't be arguing about whether they had a right to come in. But there were no tender or offers made at any of the meetings. The nearest I could say on that, as far as I am concerned, was a letter Mr. Cox wrote on February 11th, which primarily related to the possible settlement. And in that letter of February 11th Mr. Cox made a statement to the effect that his clients wanted to come in and were desirous of coming in and were able to come in. He put that in the letter of February 11th. That is the only time there was anything [1,276] concrete presented when I was present. The rest of it was arguments on what the option meant.

Q. Does the same apply to the March meeting, I believe there was some evidence was on a Sunday?

A. Well, the March meeting, either 7th or 8th of March, and Mr. Jenkins came over and Mr. Cox and the purpose of their coming, they weren't arguing any more about what it meant, they were coming over to discuss getting together on a settlement in some way on the controversy and it was what I would call a very short meeting. They were too far apart, so they didn't talk too long.

(Testimony of Bryan Johnson.)

Mr. Moore: That is all. What did I overlook?

The Witness: Are you going to make an offer of proof on that or not?

Mr. Moore: I did make an offer of proof on the contract provisions.

The Witness: I heard him say he was going to.

The Court: It was in the nature of an offer of proof and I said the ruling would be the same. He was going to offer to prove by you the same thing he did yesterday by Mr. Grevey.

Mr. Moore: I wanted to establish that is not in there, any contention of the defendants, that is the reason I am making that offer of proof. I am trying to shorten the time and shorten the record in saying I would make in substance [1,277] the same offer.

Cross Examination

Q. (By Mr. Romley): Judge Johnson, when was the first time you learned of the September 23 letter?

A. The first time I learned of the September 23 letter was shortly after Mr. Liberman returned from New York.

Q. I think the evidence shows he returned on the 18th or 19th of October?

A. Well, they wound up on Saturday the 18th. I am sure I didn't see him until sometime early the following week. In that week I learned about it.

Q. Up to that time then, that would be the week of the 19th of October, you had never heard

(Testimony of Bryan Johnson.)

of the letter or of the agreement between the Nagels and Liberman, is that right, sir?

A. Yes, sir.

Q. Was your office employed or you personally employed to prepare the final draft of the November 6th agreement?

A. I will explain how it was, if you ask me that. I was representing Mr. Liberman and Judge Moise and Franklin Jones were attorneys for the Gallaghers and they have an office there in the same building. And Mr. Burlach was legal representative, he is an attorney in New York, of the Kaplan [1,278] interests. And Mr. Jones undertook the draftsmanship of this agreement and took the first draft and I presume conferred with Gallagher and whipped it into shape for discussion. They had a discussion. All of the draftsmanship was done in Mr., I think by Mr. Jones, after the matter had been discussed and changes made and he would go back and come up with a written document. They had a first draft, then a lot of changes made, then came in with the second draft and more changes made and the final one came out on the second draft.

Q. Did Mr. Liberman take part in the making of any of those changes?

A. Well, I would say they all took part. They all had ideas. After we would get through talking about it then we would go off and meet in the

(Testimony of Bryan Johnson.)

evening, come back the next morning and everybody would have some new ideas. So everybody took part, I would say, in the discussions, all the principals and attorneys.

Q. In your acquaintance and experience with Mr. Liberman, have you found him to be an extremely capable and shrewd businessman?

A. Well, I think he is a very intelligent man and judging from his rise in a financial way, I would conclude he was a successful businessman. I am not, so I just go by what I see [1,279] happen.

Q. Did he speak to you or mention to you this September 23 letter before Mr. Burlach came out and they started writing up this November 6th agreement?

A. Yes, I'm sure he did.

Q. Did he show you the letter at that time?

A. Yes, sir, he showed me the letter of September 23 and also this 24th letter about the seven years, showed me both of them.

Q. Was he asking your opinion, did he ask your opinion with respect to his obligations under the letter at that time?

A. Yes, we had a discussion about it.

Q. I don't care to go into the discussion. I wonder if he did bring that up?

A. Yes, he asked me what I thought about it.

Q. And do you know whether he had contacted Mrs. Nagel again after October 16th?

A. After October 16th?

(Testimony of Bryan Johnson.)

Q. Yes. Did he tell you whether he had or had not contacted her again after he talked to her on October 16th by long distance?

A. From that time up until he came up to talk to me?

Q. Yes. A. I'm quite sure he hadn't.

Q. Did he talk to you again about that letter of [1,280] September 23rd at any time prior to December 24th of 1958, that being the day, Judge, to bring it to mind, or I believe the evidence shows Mr. Liberman came to your office accompanied by Bob Jenkins.

A. Well, I can't tell you when it was or pinpoint the day. I would say he certainly did, I know that.

Q. You are certain he came to you on that day or approximately that day?

A. They came in on the 24th. You asked me prior to that—

Q. If he spoke to you again regarding this letter or agreement between the date he first mentioned it after returning from New York and December 24th?

A. Yes. I say I can't tell you the date or dates, but he did.

Q. Was it relatively near the date of meeting on December 24th?

A. I would say probably within a week at least.

Q. A week prior to that time?

A. At least that early.

(Testimony of Bryan Johnson.)

Q. So far as you know he had still not talked again to Mrs. Nagel about it?

A. That is my understanding, as far as I know.

Q. When they came to your office on December 24th, Jenkins and Liberman, do you recall Jenkins wanting to see [1,281] the contract?

A. Yes, sir.

Q. And Mr. Liberman refused to let him see it?

A. Yes, sir.

Q. And Jenkins left without seeing it?

A. Yes, sir.

Q. Later an appointment was made and you, Jenkins, Mrs. Nagel, Liberman and Mr. Cox met at your office?

A. That is correct.

Q. That is the January 6th meeting, is that right?

A. Yes, sir.

Q. Do you recall at that meeting a demand again was made or request, however you may term it for the opportunity to read the contract and see the contract, that is right, isn't it?

A. Well, if my memory serves me right they knew when they came they were going to get to see it. I believe when they came in at that time—that would have been in a telephone conversation with Mr. Cox or something, but I think they made that trip knowing they were going to see the agreement when they came over.

Q. Is it proper to assume from what you say that after the December 24 meeting between you, Liberman and Jenkins alone that you and Mr.

(Testimony of Bryan Johnson.)

Cox talked about it and Mr. Cox reiterated his clients' demand to see the contract? [1,282]

A. I got the message to him somehow that they could see it.

Q. Did you volunteer it or did they ask for it?

A. I think we volunteered it because we turned it down before and had to change the position on it. I don't know whether he said can we see it and I said yes, or I told him he could see it.

Q. If you volunteered it did you call Mr. Cox or Mrs. Nagel or Bob Jenkins and say to them: You can see the contract now?

A. I didn't talk to Mrs. Nagel or Bob Jenkins, I am quite sure. They got the message some way through Mr. Cox. Could have been Mr. Liberman told them, I don't know.

Q. Did you, after December 24, 1958 and before January 6th, 1959, call Jim Cox long distance or write him and say: You may now, you and your clients may now see the contract, or words to that effect?

A. I think I talked to Mr. Cox and told him. It may be that Mr. Liberman relayed the message to them. All I can say with any positiveness is that when they came in on the 6th they knew they were going to be able to see the contract.

Q. In other words, you don't have any recollection at all whether you talked to Jim Cox over long distance?

(Testimony of Bryan Johnson.)

A. Or whether he talked to me or not, no. I know they had the message, whether through me or what. There wasn't [1,283] any argument when they came in about seeing it at all.

Q. You had concluded to allow them to see it?

A. I had concluded?

Q. Yes.

A. I had my clients' permission to let them see it.

Q. When the contract was given them you say they went to your library and were gone some thirty or forty-five minutes and came back into your office? A. Yes, sir.

Q. Do you remember just what Mrs. Nagel said at that time when she came back in?

A. When she first came into the room she made the remark to the effect: You have made a good deal, something to that effect.

Q. Did she say: I want to buy our share?

A. I don't recall her saying that.

Q. In other words, she may have, but you don't remember it?

A. I don't remember it if she said it.

Q. She may have been, Judge, is that right?

A. She may have expressed herself, she liked to deal, or wanted to come in, but I have no recollection of anything of that kind. We were still in the argumentative stage on it and as I say I naturally assumed they wanted to come in or they

(Testimony of Bryan Johnson.)

wouldn't have been over there, at least they were [1,284] interested in coming in.

Q. Didn't they make it very plain they were interested in coming in and acquire a half interest?

A. On that day?

Q. Yes, sir.

A. I couldn't say that, that they said that. The whole discussion was—that was the first time they had looked at it or seen it. She came in and said it looked like a good deal. Somebody said, I don't know whether Mr. Liberman or myself, "we don't agree that you have a right to come into this thing at all," and from there the discussion was carried on and I can't remember the details of it. All I can say is there was no specific proposal made that we want to come in, we are ready to pay our share or we have looked it over, we see the provisions and we would like to do this or do that and come in. If anything was said it was in a most general and vague way.

Q. I gather, maybe I am wrong, sir, that at least some of the things that were said in that meeting you do not recall, is that true?

A. That is right. Some things I recall.

Q. And some you don't?

Q. I recall what she said when she came in. I was very interested in this telephone conversation, the facts on that. I was very interested in that. So I listened to what [1,285] Mr. Liberman

(Testimony of Bryan Johnson.)

said and was very much interested in what Mrs. Nagel might say. So that is something I remember very distinctly. These other things, a lot of stuff went on I couldn't quote anybody.

Q. What did Liberman say with regard to the matter after Mrs. Nagel said: "You have made a good deal, Maurice," and if she said, "we would like to buy our share." What did he say?

A. Mr. Liberman said that—I can't quote him exactly, but he said: "Well, I gave you a chance to come in and under this arrangement you had to make up your mind whether you were interested or not. I asked you to come back to New York and you told me you weren't interested." He more or less went through the whole conversation very much like he did here, like he did in his deposition; as he said, it was sort of a record. And when he got all through no comments were made about it at all.

Q. Mrs. Nagel just sat there and didn't deny a thing he said?

A. Of that I am positive because I was particularly interested, since the lawsuit was on the horizon, I was particularly interested in what her position was going to be with respect to those telephone conversations. So I know she said nothing.

Q. Did Mr. Liberman say to her that this was a different [1,286] deal and she had no right to participate in it for that reason?

(Testimony of Bryan Johnson.)

A. In the course of his conversation he said words to this effect: "I think this is a different deal." He said: "I afforded you the opportunity to come in, it wouldn't make any difference, I felt I owed you a moral obligation," used that expression. Although he did say that in his mind it was a different deal than they had in mind when they signed up in September.

Q. Do you remember at that time in the presence of Mr. Cox saying to Maurice or Mr. Liberman that there is no basis for his claim that this was a completely different deal?

A. Who said that?

Q. That you said that to Mr. Liberman?

A. I am not going to deny I said it. I have told him that, so I am not going to deny I said it there. I have told him that.

Q. You have told him there was nothing to that particular claim?

A. I told him I wouldn't want to hang a lawsuit on that.

Q. Was there at any time in that conference a statement made to you that, to you or to your client, that the Nagels were in effect ready, willing and able to proceed and wanted to proceed with the purchase of the half interest?

A. I don't recall any such statement. [1,287]

Q. Was there any such statement in effect made on the March 8th meeting conference?

(Testimony of Bryan Johnson.)

A. I don't think so. That was a short meeting and as I recall the whole thing was on the question of settlement, trying to settle it up.

Q. Do you have the feeling at that time, Judge Johnson, the Nagels were interested only in getting a money settlement or they wanted to acquire a half interest in this property?

A. Are you talking about an opinion I formed?

Q. Yes, sir.

A. Well, you mean——

Q. I want your opinion, yes, sir.

A. Of the whole thing, you mean, or on that day?

Q. I am asking you, sir—let me put it a little more specific. Is it your opinion that on January 6th, 1959, the Nagels and their attorney—I say Nagels, I mean Nagel Lumber Company, Mrs. Nagel and Mr. Jenkins—were there trying to effect a settlement or trying to exercise and wanted to exercise their right as they believed it to purchase a half interest in these Gallagher properties?

A. Well, I would have to answer it this way: That Mr. Liberman indicated on the 24th of December when he didn't want to show them the agreement——

Q. I am not asking you what Mr. Liberman indicated, I am asking you your opinion. [1,288]

A. I am telling you what it is based on.

Q. You tell me first what your opinion is.

(Testimony of Bryan Johnson.)

A. My opinion is that they knew that Mr. Liberman was not going to acknowledge the option and that they were preparing themselves for a lawsuit for money damages.

Q. That is your opinion?

A. Yes. That has been confirmed by the fact, in my mind, that they didn't sue for specific performance. Out of it all would come perhaps—they were excused from making the formal tender by the thing, no use making it because they already said they were not going to recognize the option.

Q. When did you first reach that opinion?

A. I had that opinion from the January 6th meeting on. [1,289]

Q. (By Mr. Romley): From that time on?

A. Yes, sir.

Q. Did you get a letter—I think you referred to it—from Mr. Cox, you referred to it by date only, February 11, 1959?

A. Yes, sir.

Q. Do you have the original of that letter here?

A. I have the letter.

Q. May I see it, please, or I will use a copy, it makes no difference?

A. Well, I don't mind you seeing it but you have it.

Q. We have the copy, I just didn't want to be confronted with the——

A. Sure, that's it.

Q. Do you remember at that time Mr. Cox told you—well, let's mark it for identification, please.

(Testimony of Bryan Johnson.)

The Witness: Is that the one that contains the settlement proposal? What date is that one?

Mr. Romley: February 11th, the same one you referred to, Judge.

(Plaintiffs' Exhibit 24 marked for identification.)

Q. (By Mr. Romley): Judge Johnson, will you please look at Exhibit 24 and tell me if that is a copy of the letter you received?

A. Yes, sir. [1,290]

Q. Dated February 11th, 1959, addressed to you by James J. Cox, Jr., attorney for the Nagels?

A. Yes, sir.

Q. In that letter did Mr. Cox say to you, first, "Nagel would be willing to purchase one-half of all timber rights obtained in this deal, approximately 24,000 feet, at the same purchase price paid or payable by Liberman together with a one-half interest in all future United States Forest sales plus the firm option to purchase the Arizona Timber Company, seven years from the date of the Gallagher-Liberman transaction at a price and upon terms to be negotiated?"

A. Yes, sir.

Q. Did you consider that as an attempt to effect a money settlement rather than acquire a half interest in the Gallagher properties?

A. The whole letter led me to that conclusion that I reached. You just read part of it. Of course the other——

Mr. Romley: I will offer the whole letter in evidence.

(Testimony of Bryan Johnson.)

A. —relates to settlement.

The Court: Any objection to it, Mr. Moore?

Mr. Moore: Give me just a moment to look at it. I think there are some parts of it, your Honor, that would not be competent evidence and I'm sure the Court will disregard that part of it that's not competent evidence and upon that ground I have no objection. [1,291]

The Court: It may be received.

(Plaintiffs' Exhibit 24 received in evidence.)

Q. (By Mr. Romley): Did you receive any further letters from Mr. Cox regarding this subject?

A. Regarding what?

Q. Regarding the Nagels' right or asserted right to acquire a half interest in the property?

A. I don't know whether I did or not.

(Plaintiffs' Exhibit 25 marked for identification.)

Q. (By Mr. Romley): Is Exhibit 25 a letter addressed to you by Mr. Cox dated March 9th, 1959?

(Plaintiffs' Exhibit 26 marked for identification.)

A. Yes, I received that letter and made that answer.

Q. And did you reply to that letter under date of March 28, 1959, which is Exhibit 26?

A. Yes, sir.

Mr. Romley: I offer 25 and 26, your Honor.

(Testimony of Bryan Johnson.)

Mr. Moore: I don't know for what purpose they show. Your Honor, the first exhibit, Plaintiffs' Exhibit 25 is certainly a self-serving document and the March 28th letter is solely with respect to the settlement. Now, if the Court would have to look at them to determine it, and upon my knowledge the Court will disregard irrelevant evidence, they are in the record, I have no objection to them being admitted.

The Court: They may be received.

(Plaintiffs' Exhibits 25 and 26 received in evidence.) [1,292]

Q. (By Mr. Romley): You say from March 6th on it has been your opinion that the Nagels were interested in money damages rather than in acquiring a half interest in the properties under the September 30th agreement?

A. That was my feeling about it, yes, sir.

Q. Is it still? A. Yes, sir.

Q. Is your client willing today to proceed with that same agreement if we dismiss this lawsuit?

A. I don't know.

Mr. Moore: Well, we object to that, that certainly is—we wouldn't be here if we were willing to do that.

Mr. Romley: There has been a charge here in effect of bad faith on the part of the plaintiffs.

Mr. Moore: Oh, now——

The Court: The only difficulty is that you have gotten Judge Johnson into this. I mean he wasn't examined about that and you pressed him for his

(Testimony of Bryan Johnson.)

opinion. In other words, if it's in here it's in because you brought it in and I don't think it accomplishes anything. We have got to decide this case between these parties not on what Judge Johnson thinks or what anybody else thinks, but what the evidence and the law would require. And my reason for limiting this is because actually it came out with your questioning of him, and when you bring that in, why, you could argue it endlessly. There [1,293] was no charge of bad faith made, it certainly wasn't made with any—if you construe it as that—voluntarily, it was requested from the witness. So the objection is sustained.

Q. (By Mr. Romley): Well, throughout that meeting of January 6th Mr. Cox was taking the position that his clients had the right to exercise the option at that time, is that right, sir?

A. On January 6th?

Q. Yes.

A. He took the position that, under his construction of the September 23rd agreement, that they had a right to come in any time up to April 30th, that was his position.

Q. And they never at any time receded from that position, did they, in any communication, oral or written, that they had with you?

A. No, sir.

Mr. Romley: That's all.

Mr. Moore: I think that's all. May I have the deposition of Robin Bishop that we opened the

(Testimony of Bryan Johnson.)

other day and the depositions of Mrs. Nagel and Mr. Jenkins, and will you mark each of them as an exhibit.

Mr. Romley: I have no objection to any of those three depositions being received in evidence.

The Court: Mrs. Bishop, Mrs. Nagel and Mr. Jenkins?

Mr. Moore: Yes. [1,294]

(Plaintiffs' Exhibits Z, AA and AB marked for identification.)

Mr. Moore: Z is the deposition of Robin Bishop, AA is the deposition of Mrs. Nagel and AB is the deposition of Mr. Jenkins. We offer those exhibits in evidence.

The Court: They may be received.

(Plaintiffs' Exhibits Z, AA and AB received in evidence.)

Mr. Moore: Your Honor, I simply want to make this statement, and be very brief because I avowed to the Court yesterday afternoon that I had a witness with respect to a discount figure. After reviewing some authorities I have concluded that the proper discounts, if the Court finds damages, is entirely a matter for the Court and not to prolong the matter, we are not going to offer that witness. But that's what he would have covered.

With that the defendants rest.

(Defendants rest.)

(Testimony of Bryan Johnson.)

Mr. Romley: Does your Honor wish to proceed before or after the recess?

The Court: We will take the regular afternoon recess at this time.

(Short recess.)

After recess:

The Court: All right, Mr. Romley. [1,295]

Mr. Robbins: We will let Mr. Romley rest his voice a minute and call Mr. Cox to the stand.

JAMES J. COX, JR.

called as a witness herein, after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Robbins): Will you state your name, please? A. James J. Cox, Jr.

Q. Where do you reside, Mr. Cox?

A. Phoenix, Arizona.

Q. And what is your profession?

A. I am an attorney at law.

Q. Practicing in Phoenix? A. Yes, sir.

Q. For how long?

A. Since September, 1947.

Q. Are you one of the attorneys for the Nagel Lumber & Timber Company? A. I am.

Q. And how long have you represented the Nagels? A. Approximately ten years.

Q. Now, do you recall, Mr. Cox, on the 16th of October, [1,296] 1958, whether or not Robert Jen-

(Testimony of James J. Cox, Jr.)

kins was present in your office at any time on that day? A. He was.

Q. Approximately what time?

A. It was early in the morning, I would say about 8 a.m.

Q. And was he there on some business matter, I assume? A. Yes.

Q. During the time that Mr. Jenkins was there, did he or you receive a phone call from Mrs. Nagel?

Mr. Moore: We object to this, if your Honor please, as not proper rebuttal.

The Court: It isn't.

Mr. Robbins: Well, if the Court please, I think all of these conversations have been gone into before, and that they, having been gone into, this would complete the picture that has been partially brought out to this extent.

The Court: No, I believe Mr. Jenkins testified and Mrs. Nagel testified about it, but that was in the case in chief.

Mr. Romley: Your Honor, may I say this: That the only way we could have gotten Mr. Cox on originally in our case would be to have called him as a witness, of course. We didn't like putting a lawyer on the stand. But when Judge Johnson testified we concluded that we should call him, and if it is improper rebuttal then I ask leave to re-open just on [1,297] that one point. I think it would be perfectly proper that we show what that conversation was and tie it in.

(Testimony of James J. Cox, Jr.)

Mr. Moore: We object to any reopening, your Honor. Counsel has had the time——

The Court: No, it should have been done in the case in chief. It's not proper rebuttal.

Q. (By Mr. Robbins): Coming then to the 6th of January, 1959, were you present in Albuquerque, New Mexico, on that day? A. I was.

Q. And had you gone to Albuquerque together with Mrs. Nagel and Mr. Jenkins?

A. No, I had gone there with Mr. Jenkins. Mrs. Nagel was already in Albuquerque.

Q. And what was the purpose of going to Albuquerque on that day?

Mr. Moore: We object to that as immaterial, if the Court please, and I again object that this is not proper rebuttal.

Mr. Robbins: This is something Judge Johnson went into, if the Court please.

The Court: The objection will be overruled. However, I think you should get directly to it. What Judge Johnson testified to, you should get directly to that.

Mr. Robbins: Perhaps I should get a little shorter.

The Court: If I didn't know anything about it, [1,298] it might be necessary to lay a foundation, but I think I know what you are going to get to.

Q. (By Mr. Robbins): You have heard some testimony here today about a meeting that took place in Judge Johnson's office on the 6th of January, 1958, is that correct? A. Yes, sir.

(Testimony of James J. Cox, Jr.)

Q. And—'59. And you were present at a conference with Mrs. Nagel and Bob Jenkins and Judge Johnson and Mr. Liberman as has previously been testified? A. That's correct.

Q. And you heard Judge Johnson relate the substance of the conversations that took place there as he recalled them? A. I have.

Q. Will you tell us briefly and in substance what occurred during that meeting of January 6th, 1959, to the best of your recollection?

Mr. Moore: We object to that as not proper rebuttal, your Honor, if the Court please, because he is asking for the whole conversation, the whole conference. If it is to be rebuttal it's—I insist it should be limited to the testimony of Judge Johnson as to his recollection of certain statements made.

The Court: Well, no, it goes to more than that. I believe Mr. Liberman testified to it, and other witnesses. At least Mr. Liberman and Judge Johnson. No, he may answer. [1,299]

(Whereupon, the pending question was read by the reporter.)

A. Well, first of all we came in, were introduced to Judge Johnson. Immediately we were given the November 6th contract and retired to Judge Johnson's library, that is Mrs. Nagel, Bob Jenkins and I.

(Testimony of James J. Cox, Jr.)

We read the contract, made some brief notes on it. Then we returned to Judge Johnson's office. All of us sat down in his office and as I recall Mrs. Nagel initiated the conversation. She said words to this effect: "Maurice, this is a good deal. You said you could make a better deal than we could and you have. It's a wonderful deal and we want our share," or "I want to buy our share," or words to that effect.

Q. (By Mr. Robbins): You are talking now about after Mrs. Nagel and Bob Jenkins and you had reviewed the contract?

A. This is correct. Immediately Mr. Liberman started talking. He made several contentions in the conversation, the first of which was—well, he first stated that he owed—that she didn't have any right, he had no obligation to her. The first reason he gave for this was that this was an entirely different transaction than the one that was contemplated in the September 23rd letter. The second contention was to the effect that he had made other commitments and presumably would not be able to deal with the Nagels because of these other commitments. He stated, at a later time there was a discussion—first of all [1,300] there was a discussion concerning the first of these two statements. When Mr. Liberman said this was an entirely different transaction, Judge Johnson talked to him about this. He said, "Well, Maurice,

(Testimony of James J. Cox, Jr.)

was the property that was involved in the September 23rd letter the same property that you have ultimately purchased?"

And he said, "Yes, it is."

And Judge Johnson said, "Well, even though it may have been a different transaction than you anticipated on the September 23rd, even though it may have been for different terms or a different price, still if it's involving the same transaction I should think that you would still—it would still be under the contract that you have made with Mrs. Nagel."

Following this he made statements and he repeated them several times in the conversation that he had made other commitments. In the course of the conversation he said to Mrs. Nagel, "I phoned you from New York and you released me," or words to that effect. And Mrs. Nagel replied, "Maurice, didn't you get my wire?"

Whereupon, he replied to this, "Yes, but you should have come back to New York, you should have come back and participated or gotten into this transaction. You had your opportunity," or something to that effect, "and you didn't do so." Whereupon we got into the discussion concerning whether or not this was an option to become a signatory to the contract [1,301] or to come in immediately after the contract was executed or whether or not it was a continuing option that would last until April 30th. And the discussion along these lines was carried on by and large be-

(Testimony of James J. Cox, Jr.)

tween Judge Johnson and myself concerning the interpretation of the letter, we had the letter out and we were looking at it and he and I discussed it. [1,302]

Q. Was that in substance the conversation that took place on the 6th of January?

A. Well, I recall another matter that was discussed. I asked Maurice in the conversation what he meant by the last clause, as I recall, in the September 23rd letter, the clause that said: "This option shall continue in full force and effect for a period of six months unless terminated by mutual consent." And I said, "Maurice, did you intend that this go on in perpetuity?" And he said, "No, what I meant was that if either party wanted to cancel it, that they could cancel it." And we discussed—we talked for some while. All the time we were debating whether or not the Nagels had the right to buy into the transaction. After we had more or less fully completed the conversation, we were discussing perhaps irrelevancy. We discussed what a beautiful new building that Judge Johnson was—his offices were in, and he made some comment to the effect, "Well, we are living in good times now and we have for some while, but it could change, we could have a depression just practically over night." I think he made the statement if Krushchev and Eisenhower got together and settled the cold war and all the sup-

(Testimony of James J. Cox, Jr.)

port was pulled out of Albuquerque by the armed forces that was carrying the economy, that there would be a depression immediately.

Mr. Moore: If the Court please, I don't believe [1,303] it's relevant to any issue whether Judge Johnson was prosperous and was in a new building, and his interpretation of the economic condition of the world. I therefore move to strike that and object to any further—

Mr. Romley: It is preliminary, your Honor, as the evidence will disclose.

Mr. Robbins: He just stopped him about a second too soon.

Mr. Moore: Well, I thought I waited too long.

Mr. Romley: Just a moment, the Court hasn't ruled.

The Court: You may proceed.

A. Whereupon I turned to Maurice and I said to Maurice, "Well, in view of all this I tell you what you do, Maurice," and he said, "What?" And I said, "Unload half of that mill on the Nagels." Whereupon he and Judge Johnson laughed at us, and that was about the conclusion of the conference.

Q. (By Mr. Robbins): Now after that conference there was some correspondence, copies of which are now in evidence, is that correct?

A. That's correct.

Q. And on March 8th you had another meeting in Albuquerque, is that correct?

A. That's correct.

(Testimony of James J. Cox, Jr.)

Q. Attended by the persons that have been described as being there in the previous [1,304] testimony?

A. That's correct.

Q. And without going into that conference, what was generally the subject matter of that conference?

A. Well, I had written a letter to Judge Johnson in an effort to settle the matter. I don't think that prior to the March 8th conference we had had an answer in any way to the letter that I had written. We went there for the purpose of seeing if they would accept any of the propositions that—

Mr. Moore: We object to the purpose, if the Court please.

A. All right. We went there to discuss the letter—excuse me.

Mr. Moore: I think we are getting into discussions of settlement and so forth, and I object to that.

The Court: I don't know what he is getting into. He may testify about the meeting of March 8th, what happened there.

A. We went to the meeting and Mr. Grevey, Mr. Liberman, Judge Johnson, Bob Jenkins and I were there. I think immediately as soon as we sat down either Bob or I asked them if any of the propositions that we had suggested through my letter were acceptable, and they advised us that they were not. I think I then said, "Well, we have made suggestions. I wish that you would make some alterna-

(Testimony of James J. Cox, Jr.)

tive suggestions." [1,305] Whereupon they asked us to leave the room. We stepped out for a few minutes and then they—we came back in and they made, or they made an alternative suggestion concerning settlement and the rest of the conference concerning settlement, and that was the conclusion of it, concerning settlement.

Q. That was the end of the conference, is that right? A. That's correct.

Mr. Robbins: That's all.

Mr. Moore: I've been waiting for a long time for this, but I'm going to pass it. No. questions, Mr. Cox.

Mr. Robbins: We'd like to recall Mr. Jenkins for a few questions.

The Court: Very well.

ROBERT T. JENKINS

recalled as a witness herein, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Robbins): You are the same Robert Jenkins who has been sworn and testified here on two previous occasions during this trial, is that correct? A. Yes, sir.

Q. Now for the purpose of pinpointing what I'm getting [1,306] at here, I will ask you if you recall the testimony of Mr. Weinstein and perhaps others to the effect that in their opinion, the Wins-

(Testimony of Robert T. Jenkins)

low mill cannot be economically—I believe is the word they used—operated when and if the available timber is cut back to ten or 12 million feet per year. Do you recall that? A. Yes, sir.

Q. And I believe you have previously testified that you are familiar with the set up and with the operation, both of the Nagel plant and of the present Duke City plant, the former Arizona Timber plant located nearby, is that correct? A. Yes, sir.

Q. Based upon your experience with both of these plants, and upon the records and the evidence that you have heard in this trial, do you have an opinion as to whether the present Duke City plant at Winslow can be economically operated when 10 to 12 million feet of timber per year are run through the mill?

Mr. Moore: We object to that, if your Honor please, as not proper rebuttal. That would be a part of plaintiffs' case in chief to establish the economic feasibility of the operation throughout the period of time for which they are claiming damages by these exhibits.

The Court: He may answer.

A. May I have the question, please? [1,307]

(Whereupon, the pending question was read by the reporter.)

A. Yes, sir.

Q. (By Mr. Robbins): Now I believe one of the exhibits here shows, again for the purpose of saving time, Plaintiffs' Exhibit 12 in evidence has shown according to our calculations a profit per

(Testimony of Robert T. Jenkins)

thousand of \$8.01, projected as the probable profit from the operation of the present Duke City mill in Winslow. Do you recall that?

A. Yes, sir. I'd like to have a copy of the exhibit to look at. [1,308]

A. Yes, sir.

Q. In your opinion, Mr. Jenkins, would that figure be greater or lesser or the same, assuming the production in the Winslow mill of ten to 12 million feet per year?

Mr. Moore: We object to that. Certainly this is evidence that would be a part of plaintiffs' case in chief.

The Court: No, it is in rebuttal of items that were developed by the defendants' case. He may answer.

A. My answer would be it would be certainly no less than \$8 and probably more than \$8 per thousand.

Q. (By Mr. Robbins): Has there been a time when the Nagel mill has run through substantially the quantity of timber we are talking about now, 10 to 12 million feet per year?

A. Yes, sir.

Q. Was that done economically and profitably?

A. Yes, sir, very much so.

Q. Have those years been taken into consideration in the exhibits which you now hold in your hand, particularly Exhibit 12?

Mr. Moore: We object to that. There is no evidence this witness prepared that exhibit or knows anything about the exhibit.

(Testimony of Robert T. Jenkins)

Mr. Robbins: I believe the exhibits speak for themselves, I will withdraw the question. [1,309]

Q. First let me ask you this. I believe you have testified that there was a period of time when the Nagel mill operated on 10 or 12 million feet of timber per year, is that right?

A. Yes, sir.

Q. What years were those, approximately?

A. Specifically here, in these exhibits, 1952, '53, '54 and '55.

Q. And I believe the exhibit also shows the later years of production increased substantially, is that correct?

A. Yes, sir.

Q. How did that come about?

A. The production was increased because we had more timber to put through the plant. And we merely went from a single shift operation to an overtime operation, that is, worked more than 40 hours per week first. That increased the production. Then we went to a straight two shifts per day, which gives a total of 80 hours a week. And the sawmill, we added a planer mill, an additional planer to the planer mill and that increased the production on a single shift basis to take care of what was produced in the sawmill on a double shift basis.

Q. During the period of time the Nagel mill was running through approximately 10 to 12 million feet of timber, were you familiar with the production of the adjoining Arizona [1,310] Timber Company plant?

(Testimony of Robert T. Jenkins)

A. In a general way, yes, sir.

Q. Was it about the same during that period of time?

A. Yes, sir, on an annual basis it was approximately the same.

Q. During the period of time you increased your production, did Arizona Timber also increase their production to approximately the same extent?

A. I think they increased their production before we did ours because they purchased some Aztec timber direct. But in general it was about the same time.

Q. Do you know what changes have been made in the mill there from the time that this production of 10 or 12 million feet was accomplished as compared with the present time or the time in the near past when the production was substantially more than 10 to 12 million feet?

A. That is of the Duke City plant?

Q. The present Duke City plant, the old Arizona Timber plant?

A. Yes, sir, I know the major changes.

Q. Will you tell us what they were?

A. Yes, sir. They have installed a line bar resaw which replaced a resaw that was on the green chain, a merry-go-round. They have installed an additional planer machine in their planer mill. They built some dry sheds and I believe a shop [1,311] building, and basically that is the only changes.

Q. Now if that plant, the Duke City plant were to cut its production back to some ten or 12 million

(Testimony of Robert T. Jenkins)

feet per year, what in your opinion, what changes would have to be made in the plant or in the manner of production?

A. First you would have to eliminate completely the second shift at the sawmill. You would have to deplete your log truck force, that is the number you would have. You would have to shut down one planer machine and you would have to eliminate some supervisory personnel I am sure that is in the present operation. Basically those are the only changes.

Q. Is it upon these facts you have based your opinion that the mill then could be economically operated on a timber production of 10 to 12 million feet per year?

A. On these facts, yes, sir.

Q. One other subject, Mr. Jenkins, again to pinpoint this. Do you recall the testimony of Mr. Weinstein and others concerning contract log hauling versus hauling with your own equipment?

A. Yes, sir.

Q. Have you had experience with both of these methods?

A. We have had experience with contract hauling, with partly contract and partly owned, and completely owned.

Q. And in your experience which manner is the most [1,312] economical in an operation of the type which you have at Winslow and which Duke City has at Winslow?

A. The completely contract log hauling.

(Testimony of Robert T. Jenkins)

Q. In fact, is that the method you are now using in your mill as Winslow? A. Yes, sir.

Q. I believe you testified that you believe the contract hauling is more economical than doing it with your own equipment. Will you tell us how much less in your experience?

A. Our experience has been, rather the costs have varied from year to year from a high of \$6 and some odd cents per thousand feet more to do it yourself than to contract it, to a low, I believe of about \$1.10. Never less than the contract.

Q. Do you have any opinion then whether it would be more economical to replace hauling equipment when it wears out or go to contract hauling at that time? A. Yes, sir.

Q. What is your opinion?

A. My opinion would be if we had our own truck force we would replace it, log haul truck force, with contractors at the earliest opportunity.

Mr. Robbins: That is all. [1,313]

(Cross Examination)

Q. (By Mr. Moore): These contract haulers make some money, don't they? A. Yes, sir.

Q. They use the same equipment that a mill owner would use, don't they? A. Yes, sir.

Q. You have had experience in the increasing of the production from a 10 million per year foot mill up to 25 million, is that correct?

A. Yes, sir.

(Testimony of Robert T. Jenkins)

Q. Have you ever had any experience cutting back a mill that had a capacity of 30 million feet down to 10 million feet?

A. My personal experience, sir?

Q. Yes. A. No, sir.

Q. Isn't it a fact, Mr. Jenkins, that your primary purpose—I mean by you, Nagel, in the original negotiations in this thing was to be where you could acquire this mill and get it out of competition with you when the Aztec timber was cut?

Mr. Romley: Just a moment. I don't think that is proper cross examination now, your Honor, pointing to rebuttal.

The Court: It is outside the scope of direct examination.

Mr. Moore: I am leading up to the statement he made [1,314] about economical operation in the future.

The Court: He is talking about the mill in the abstract.

Mr. Moore: I am sorry.

The Court: All his testimony has been about a mill in the abstract.

Mr. Moore: No, he talked about operation when it was cut back to 10 million feet.

The Court: That is true, but I don't see what that has to do with the purpose when they were buying or entering into this agreement.

(Testimony of Robert T. Jenkins)

Mr. Moore: The purpose I want to show is this, and I think maybe the evidence already establishes it, when they were negotiating, they were talking about at the end of the cut of Aztec timber when under the management plan and the Chevalon working circle, the production would drop to about 20 million feet, and what their interest was at that time to get a mill out of the way so they could operate their mill on 20 million feet.

The Court: He may answer.

A. May I have the question.

Q. Isn't it a fact your purpose in your negotiation to acquire the mill at the end of the cut of the Aztec timber? [1,315]

A. To acquire the Duke City mill at the end of the cut of the Aztec timber? Yes, sir, we would like to acquire the mill at that time.

Q. When you acquired it at that time the available production from the Forest Service would have dropped down to about 20 or 21 million feet per year, wouldn't it?

A. Yes, sir.

Q. And if you could make more profit on ten million feet per year with your mill, why is it you don't want competition when it drops down to where you only had 10 million feet?

A. I didn't say we don't want competition, sir.

Mr. Moore: That is all.

Mr. Robbins: That is all.

Mr. Romley: Plaintiffs rest, your Honor.

(Plaintiffs Rest)

Mr. Moore: If the Court please, at the end of all the evidence there are two motions I want to make; one I will make a brief explanation of why I am making it.

In the original complaint in this action and in the pre-trial conference the position of the plaintiffs as we understood it, solely was relying upon the September 23rd letter as a written agreement. From their amended complaint and the evidence, it appears to me that they may now, although I cannot tell for sure, be basing a part of their case upon an oral agreement. And in view of that [1,316] interpretation I now move the Court for leave to amend the answer of the defendants to conform to the proof. And I may say I haven't had an opportunity to type this out, will read it in the record, and would like to after I return to my office type it and mail it.

The amendment would be as follows:

Fifth Defense. As and for a further and separate defense, defendants allege that the plaintiffs may be relying upon an oral agreement, which agreement is an alleged option for the purchase and sale of real property, or an interest therein, and that under the Statute of Frauds, Arizona Revised Statutes 44-101, no action may be brought thereon unless there is a memorandum thereof signed by the parties sought to be charged. That the letter agreement of September 23rd attached to plaintiffs' amended complaint as Exhibit A, which plaintiffs' allege evidences the aforesaid oral agreement, is not

a sufficient memorandum of said oral agreement to comply with the Statute of Frauds in the event that plaintiffs are relying upon such an oral agreement.

The Court: Leave is granted to amend the answer accordingly.

Mr. Moore: Now, I don't think it is necessary to amend to plead an affirmative defense on what I am going to say, but if there is any doubt in the Court's mind about it I want leave to make [1,317] a further amendment, and that is on this basis:

As I view the record, if we give full and complete credibility to evidence of the plaintiffs and evidence of the defendants, then it is apparent that there was never a meeting of the minds upon which there could be the basis of an action for alleged breach of contract.

I believe in our denial and answer we have raised that and I don't think it is necessary to plead a failure of meeting of the minds as an affirmative defense, but if there is any doubt in the Court's mind about it, I want leave to so amend and so we could urge that matter at a later date.

The Court: Well, I don't believe you need an amendment to raise that.

Mr. Moore: Very well. Now, at the close of all of the evidence, if your Honor please, the defendants renew their motion that they made at the end of the plaintiffs' case for judgment dismissing the complaint and rendering judgment for the defendants, upon the grounds stated in that motion at

that time in the record, and upon the additional ground that under the evidence it is clear that there never was a meeting of the minds of the parties on any contract or agreement upon which this action could be based. Furthermore, there is insufficient evidence, giving the plaintiffs the inferences which they are entitled to on their evidence, to establish any liability on the part of the defendants. [1,318] And I have in mind the Rule in Arizona that on a court case it is different than it is in a jury case in that in a jury case if there is any inference from the evidence upon which reasonable minds might differ, then it is the duty of the Court to send the case to the jury. But in a court case—there are two cases and I can't think of the citations—upon a motion such as I am making the Court waives the credibility of the evidence, both at the end of the plaintiffs' case and at the end of the whole case, upon such a motion.

I don't desire to take the time to argue them, your Honor, but I wanted those motions before the Court.

The Court: The motion is denied.

Mr. Moore: What is the pleasure of counsel and the Court with respect to argument and briefs, may I inquire?

Mr. Romley: I think we should defer to what the Court wishes, either orally or in writing or submit it.

The Court: I think it is a matter for written briefs. As to the matter of time, counsel know their

obligations to other matters that they have better than I do and I will be guided largely by counsels' desires in the matter of time.

Mr. Romley: In reference to time, is it a fair question to inquire if the Court wishes us to brief every point that counsel considers is pertinent, or is there any particular matter that your Honor wishes briefs upon? [1,319]

The Court: I think all of the matters ought to be covered.

Mr. Romley: Every question conceivable to counsel.

I think we could get our brief in—we are anxious to get it in and we can do it better in the next ten days. If we don't do it in the next ten days we will have to ask for sixty. Perhaps it might be better to ask for fifteen and think we will get it in ten, if that is not too long, your Honor.

The Court: The sooner the better, as far as I am concerned.

Mr. Moore: I don't like to ask for a lot of time when counsel for the plaintiffs doesn't ask for much time, but I do have some commitments; one is entirely personal that I must be away on, my one chance in a lifetime to do that. I would like to have thirty days after we are served with plaintiffs' brief.

(Discussion off the record.)

The Court: Very well, the matter will be submitted on briefs on the basis of fifteen, thirty and fifteen days. Upon the filing of the reply brief the matter will stand submitted.

I don't anticipate requiring oral argument after the briefs, if I should I will advise counsel promptly and we will do that.

[Endorsed]: Filed June 20, 1961. [1,320]

PLAINTIFFS' EXHIBIT No. 1

Thomas P. Gallagher

Post Office Box 63

Albuquerque, New Mexico

Mr. Maurice Liberman

September 12, 1958

P. O. Box 1364

Albuquerque, New Mexico

Dear Sir:

This letter will serve to confirm our discussion regarding your purchase of our plant at Winslow, Arizona. It is specifically understood, however, that while the plan and program has the general approval of myself and J. M. Kaplan, we do not hold the proxies of a majority of stockholders, and although we are authorized to negotiate we do not have an authorization to make a final deal. If, however, the context of this letter is in accordance with your understanding, we will submit and recommend acceptance of this proposal to the directors and stockholders of Arizona Timber Co. and New Mexico Timber Co. and to the partners of Bernalillo Lumber Co.

It is further understood that we have an oral reciprocal first refusal agreement with Mrs. George H. Nagel, and any sale is subject to her first re-

Plaintiffs' Exhibit No. 1—(Continued)

fusal. While I have reason to believe that I can cause her to give that first refusal, I can make no warranty whatsoever. Since before concluding this deal it would be necessary to get her refusal, and accordingly thwart the possibility of a sale to her, we ask that you indicate your seriousness of purpose to accept this proposal by depositing with us the sum of \$10,000.00. In the event we are unable to obtain her refusal, or the proposal is otherwise unacceptable to my principals, that deposit will be refundable to you plus the sum of \$2,500.00 for the trouble and expense you will incur in connection with this negotiation. If you fail to follow through in accordance with this proposal, you will forfeit the sum of \$10,000.00. It is further understood that this proposal will be subject to our acceptance within a period of thirty days from date, whereupon you will be credited with the aforementioned \$10,000.00 against the purchase price.

1. For and in consideration of the sum of \$500,000.00 which will be payable in sixty (60) monthly payments, starting on the date of your acquisition and succession, plus interest at the rate of six percent (6%) on the unpaid balance, with right of acceleration, we will sell you the assets of our Winslow plant. Title to said property will not pass until the entire sum is paid and the partners of Duke City Lumber Co. are to give their per-

Plaintiffs' Exhibit No. 1—(Continued)

sonal guaranty on the paper. The papers shall be written to such manner as accountants and attorneys for both parties deem proper, providing for insurance coverage with clause payable to us, proper care and maintenance of the chattels involved, etc. By "plant" we are specifically referring to our physical assets at Winslow, which are generally detailed on the attached list. In addition thereto, we are proposing to transfer title to our land located in the Sitgreaves National Forest, our land at Winslow, and such easements, leases, etc. as we have thereat.

2. Your company owes Arizona Timber Co. approximately 14 million feet of stumpage. It is agreed that upon your acquisition of the Winslow plant, you will process 14 million feet of stumpage into lumber for us under the same terms and conditions applicable under the agreement between Arizona Timber Co. and Duke City Lumber Co., except that Arizona Timber Co. will be in the position of Duke City Lumber Co., and Duke City Lumber Co. in the position of Arizona Timber Co. Delivery of said lumber is to commence as soon as you succeed us in our operations.

3. The companies hold certain contracts with the U. S. Forest Service for timber, and these contracts will be turned over to you at our cost. You are to pay us in cash for all deposits and other prepaid expenses, and both parties are to obtain transfer

Plaintiffs' Exhibit No. 1—(Continued)

of these contracts from our companies to yours, and release us from the bonds and liabilities we have thereon.

4. Based upon a price of \$17.00 per thousand feet, Bernalillo Lumber Co. will sell you the approximately 18 million feet of timber they hold on Southwest-Aztec sections. Our contract will be transferred to you and there is a balance payable of \$11.60 per thousand feet to Southwest Lumber Mills, Inc.; \$5.40 per thousand feet will be paid in cash to Bernalillo Lumber Co. Should any additional expense arise as a result of the cruise, it shall be your responsibility to pay that additional expense.

5. The basis of your acquisition and succeeding us in operating the plant will be as follows: We will stop cutting timber for our own account at a point and place where it is convenient to do so; that is to say, at a completion of a portion of an Aztec section, or completion of a timber deposit on a Forest Service section, and logs cut thereafter shall be for your account. Similarly, when these logs go through the sawmill, the sawmill operation is for your account and your responsibility. Similar steps will be taken through the dry yard, planing mill, and shipping. At such time as all of our surfacing is completed, the planing mill will be turned over to you, then an inventory will be taken of the rough lumber which we hold in the yard for your account. As provided in our agreement, you will pay us for the cost price of same, except that on rough lumber in

Plaintiffs' Exhibit No. 1—(Continued)

pile, the depreciation charge will be reduced to \$3.50 per thousand and the profit will be reduced to \$2.00 per thousand, payable as shipped. On all surfaced lumber in inventory, you will pay us the full charge except for shipping charges. On such surfaced lumber as we have remaining in inventory you will ship same for us under the same terms and conditions as we have shipped for you, but allowing you a profit of \$1.00 per thousand feet above the actual cost (excluding depreciation and overhead) [with the understanding that all of said lumber will be shipped out within ninety (90) days from date of transfer.]* Our rough lumber will be handled as we propose handling yours.

6. We will assign to you all credits of prepaid items, such as prepaid insurance, Workmen's Compensation, unemployment compensation, etc. and you are to pay us for same at the unexpired value of those, plus accrued dividends or other credits in connection therewith. Property taxes, license fees and all other prepaid expenses will be prorated as per date of transfer. Payment for all the above will be due in cash the date of transfer.

7. The agreement will be with the specific understanding that our employees will remain employed for a period of 120 days after date of transfer, and that you will dismiss no employee during that period except for good cause. You

*Cancelled. Initialed I/M.L.

Plaintiffs' Exhibit No. 1—(Continued)

will, however, have the option of dismissing any employee by paying him the equivalent amount of salary between the date of dismissal and 120 days, upon our request. We do not propose to make our employees aware of this, but we do want to be able to give them some assurance of continuity of employment, and we in turn shall exert our best efforts to cause them to stay in your employ, and accordingly refrain from hiring any of said employees without your consent.

If the foregoing is in accordance with your understanding, kindly so indicate by affixing your signature in the space provided below and tendering your check to Bernalillo Lumber Co. for \$10,000.00 as provided above.

Very truly yours,

T. P. Gallagher.

Agreed To and Accepted, but without in any manner admitting or agreeing that you have the right of assigning or selling the contract between Duke City Lumber Co. and Arizona Timber Co. dated August 9, 1957.

/s/ M. LIBERMAN.

Plaintiffs' Exhibit No. 1—(Continued)

Winslow Property

	Cost
Woods camp	\$ 28,734.78
Mill pond	16,698.01
Bandmill—building and machinery	264,699.02
Power plant	20,610.54
Piling sticks and stacking sticks	33,230.99
Dry kiln	56,763.41
Dry kiln	51,528.57
Planing mill	209,739.06
Box factory	1,366.02
Railroad spur	4,145.01
Land improvements	15,436.19
Lumber loaders	1,789.29
Shipping office	596.69
Dry lumber shed	16,630.11
Shop building	16,380.12
Office building	3,974.13
Office furniture & fixtures	1,364.09
Radio equipment	7,121.01
Sub-total	750,807.04
#12 Auto patrol	16,718.20
Caterpillar #977	20,756.65
Gerlinger lift truck	7,325.00
Yale lift truck	11,220.00
Gerlinger lift truck	5,500.00
Gerlinger carrier	4,874.46
Gerlinger carrier	7,675.00

Plaintiffs' Exhibit No. 1—(Continued)

Gerlinger carrier	7,675.00
Gerlinger carrier	3,500.00
Mack log truck	17,634.76
Mack log truck	17,634.74
Mack log truck	17,634.74
Mack log truck	17,634.74
Mack log truck	17,634.74
Mack log truck	16,785.00
Mack log truck—L J	14,228.00
Mack log truck	19,294.00
9 Pierce trailers	27,170.28
1956 Ford F100 pickup	2,172.50
1950 Ford F-7	3,535.00
1950 Ford F-3	1,907.40
1948 Ford pickup	400.00
1946 Dodge fire truck	1,636.68
Hobart welder	1,000.00
Hobart welder	799.00
Gardner-Denver compressor	1,825.00
Gardner-Denver compressor	2,264.75
Westinghouse compressor	501.28
Farmall tractor	750.00
Equalizer	3,388.80
Diesel and gas tanks & pumps	2,194.92
Motor grader #11	1,750.00
Chevrolet station wagon #54	2,235.75
Work in process items:	
Raising conveyor on burner	2,538.90
Newman planer	2,034.47

Admitted and Filed in Evidence May 3, 1960.

PLAINTIFFS' EXHIBIT No. 2

Oct. 16

Western Union Telegram

M. LIEBERMAN

Winslow, Arizona

Room 831 Essex House 160 Central Park South
NYK. Do not wish to release options at this time.

Nagel Lbr and Timber Co

Mrs Geo H Nagel

Charge

Admitted and Filed in Evidence May 3, 1960.

PLAINTIFFS' EXHIBIT No. 3

September 23, 1958

Mrs. George H. Nagel

Nagel Lumber & Timber Company

Winslow, Arizona

Dear Mrs. Nagel:

It is our understanding that you have a "first refusal agreement" with Arizona Timber Company to buy out their Plant at Winslow; and, if you turn down this option it is our understanding that we are second in line to buy the Plant.

It is now mutually agreed that in case either of us (and by this is meant, the companies controlled by the Liberman Group as one party; and the Nagel Lumber and Timber Company or any company controlled by the Nagel Family as the second party) will take-up the proposition made by Arizona Timber Company and buy out the

Plaintiffs' Exhibit No. 3—(Continued)

Winslow Plant from them, then our companies will have the option to participate in that purchase on a fifty-fifty basis at the same terms as the purchaser will get from the Arizona Timber Company.

This option remains in force until April 30, 1959, and will be automatically extended for six month periods unless cancelled by mutual consent.

Very truly yours,

/s/ M. LIBERMAN
Maurice Liberman
Liberma Group

/s/ By M. LIBERMAN
Nagel Family

/s/ By ROBERT F. JENKINS

ML:rb

Admitted and Filed in Evidence May 3, 1960.

PLAINTIFFS' EXHIBIT No. 5

Arizona Timber Co.

P. O. Box 1273

Winslow, Arizona

August 9, 1957

Mr. Maurice Liberman
Duke City Lumber Co.
Albuquerque, New Mexico

Dear Sir:

This will serve to confirm our understanding and supersede all previous written memoranda wherein we have agreed to cut, log, haul, dry, surface and ship approximately 63 million feet of timber for you at our plant.

This timber will be intermingled with timber furnished by Bernalillo Lumber Co. and will be delivered to you at the rate of approximately 15 million feet per annum more or less, which will give you exactly 50% of the total production of the plant.

For and in consideration of these services, you will pay us the sum of \$75,000.00 per year for general and administrative overhead expenses (not including foremen or superintendents) regardless of the quantity of lumber cut. In addition, you will pay us the total actual direct cost of manufacture (except overhead and depreciation provided for herein), plus \$4.33-1/3 per thousand feet for depreciation, plus \$3.00 per thousand feet for our profit, plus applicable Arizona sales tax.

Plaintiffs' Exhibit No. 5—(Continued)

Logging and lumbering will be done so as to divide the logs in order to yield an equal grade realization to both parties, and in accordance with good manufacturing practices, and cut so far as practicable to your specifications. Plant and equipment facilities, with the exception of dry kilns and dry sheds, will be utilized in the processing of your lumber in the identical manner it is for our own. The division of shifts in both sawmill and planing mill will be made in the most practicable manner to give both parties an even break.

In essence, this entire agreement is to permit you to have the use of those facilities and benefit from our experience and ability in the same manner in which we do, and the spirit of this agreement is that the costs and services shall be divided between the parties as fairly and equitably as possible. In the event of a major change in overhead or depreciation items or production volume, either party shall have the right to ask for an adjustment.

Your accountants will be given monthly statements of costs for their examination and approval. Payment for services rendered will be due on the 10th of the month after rendition, without discount. In the event of any dispute for any cause, including termination or breach of agreement, which we are unable to settle between ourselves, we shall submit same to an arbiter. We have agreed

Plaintiffs' Exhibit No. 5—(Continued)

that the arbiter will be J. B. Edens of Phoenix, Arizona. In the event he is unable to serve, we shall then choose an alternate arbiter and if necessary, have the American Arbiters Association select same, whose decision shall be similarly final and binding.

The term of this agreement shall be until all of your timber in the Winslow area is cut and delivered to you. In the event there is additional timber over and above the 63 million feet aforementioned, or that you acquire other timber, we shall mill same for you on the same terms and conditions providing we have sufficient timber of our own to run a parallel shift.

This agreement shall be governed by the laws of the State of Arizona.

If this is in accordance with your understanding of our agreement, kindly so indicate by affixing your signature in the space provided below.

Very truly yours,

ARIZONA TIMBER CO.

/s/ T. P. GALLAGHER

Agreed To and Accepted:
Duke City Lumber Co.

/s/ By M. LIBERMAN

Plaintiffs' Exhibit No. 5—(Continued)
Arizona Timber Co.

SUPPLEMENT #1

P. O. Box 1273
Winslow, Arizona
August 9, 1957

Mr. Maurice Liberman
Duke City Lumber Co.
Albuquerque, New Mexico

Dear Sir:

Supplementing our agreement of even date, we shall keep records jointly of the timber cut during the fiscal year, and shall annually determine the amount of overrun or underrun from the preceding twelve months' operation, at a time convenient to record keeping. The overrun or underrun shall be credited to the parties, share and share alike, with a final adjustment at the end of the contract for the total quantity of timber each party furnishes.

If this is in accordance with your understanding of our agreement, kindly so indicate by affixing your signature in the space provided below.

Very truly yours,

ARIZONA TIMBER CO.

/s/ T. P. GALLAGHER

Agreed To and Accepted:
Duke City Lumber Co.

/s/ By M. LIBERMAN

Plaintiffs' Exhibit No. 5—(Continued)
Arizona Timber Co.

SUPPLEMENT #2

P. O. Box 1273
Winslow, Arizona
August 9, 1957

Mr. Maurice Liberman
Duke City Lumber Co.
Albuquerque, New Mexico

Dear Sir:

In accordance with our understanding of even date, we have also agreed you shall have your representative at our plant. It is understood that that representative shall have the right to give grading instructions, but shall not have the right to interfere in any way whatsoever with the supervision of the plant unless requested to do so by our own superintendents. Such discrepancies as he may find are to be taken up with you, if they cannot be readily solved in the field, and you in turn with us.

The cost of this man will be considered a cost of operation, and he therefore is to render such services in behalf of the joint operation as he has time to do.

You have chosen Lee Weaver, who is completely satisfactory to us, and if it becomes necessary to

Plaintiffs' Exhibit No. 5—(Continued)

replace him we shall expect your cooperation in selecting a man who is compatible with our own people.

Very truly yours,

ARIZONA TIMBER CO.

/s/ T. P. GALLAGHER

Agreed To and Accepted:

Duke City Lumber Co.

/s/ By M. LIBERMAN

Arizona Timber Co.

SUPPLEMENT #3

P. O .Box 1273

Winslow, Arizona

August 9, 1957

Mr. Maurice Liberman
Duke City Lumber Co.
Albuquerque, New Mexico

Dear Sir:

This will supplement our agreement of even date, to clarify the manner and method in which payment is to be made for services rendered.

Payments for overhead shall be made in twelve equal installments, payable on the first of each month. Payment for lumber shipped will be expected within ten days after date of invoice. Charges for lumber invoiced shall be at the pre-

Plintiffs' Exhibit No. 5—(Continued)

Supplement #3—(Continued)

ceding average monthly cost, to be redetermined on a final basis as of April 30 each year.

On or before April 30 each year, we shall invoice you for all services rendered on work in process; i.e., log and lumber inventories, and shall expect payment for same before April 30. After the April 30 payment as provided above is made, you shall subsequently pay the difference between the price paid for work in process and the price of shipped lumber, until said payment for work in process has been depleted.

In the event the inventory we carry for your account is in excess of three million feet, we shall call upon you to make prompt payment for the value of that inventory in excess of three million feet.

Should financing needs so dictate, we may periodically invoice you for work in process and expect you to give us negotiable trade acceptances which would be discounted at our expense for such work in process. In the event that your financing needs so dictate, we will accept negotiable trade acceptances from you, bearing interest at the current rate at your expense, payable within 60 days.

Very truly yours,

ARIZONA TIMBER CO.

/s/ T. P. GALLAGHER

Agreed To and Accepted:

/s/ By M. LIBERMAN

Plaintiffs' Exhibit No. 5—(Continued)

SUPPLEMENT #4

August 26, 1957

Mr. Maurice Liberman
Duke City Lumber Co.
P. O. Box 1364
Albuquerque, New Mexico

Dear Sir:

Supplementing our agreement of August 9, wherever the price "per thousand feet" appears, the unit of measurement applicable thereto will be on the outbound shipping tally. The standard of measurement for thicknesses, etc., shall be the Western Pine Association standards. While interim payments may be made on log scale or green lumber tally, final determinations shall be based upon the shipping tally.

If this is in accordance with your understanding, kindly sign in the space provided below and return a copy of this letter to us.

Very truly yours,

ARIZONA TIMBER CO.

/s/ T. P. GALLAGHER

Agreed To and Accepted:

Duke City Lumber Co.

/s/ By M. LIBERMAN

Plaintiffs' Exhibit No. 5—(Continued)

Arizona Timber Co.

SUPPLEMENT #5

to Agreement of August 9, 1957

P. O. Box 1738

Albuquerque, New Mexico

January 16, 1958

Duke City Lumber Co.

P. O. Box 1364

Albuquerque, New Mexico

Gentlemen:

Supplementing our agreement dated August 9, 1957, we will lease to your company for an annual rental of \$1.00 and for a term concurrent with the duration of the contract, the land on which you have recently built a steel building in our yard in Winslow, Arizona. At the expiration or termination of the milling contract, you will have a period of 90 days in which to remove this building from our property. It is understood that within this 90 day period you will also clean up the ground on which the building was situated, and nearby, removing all foundations and restoring the property to its former condition.

Plaintiffs' Exhibit No. 5—(Continued)

If the foregoing arrangement is satisfactory to you, please initial and return to us the enclosed carbon copy of this letter.

Very truly yours,

ARIZONA TIMBER CO.

/s/ C. K. WICKENS

Vice President

Agreed To and Accepted:

/s/ By M. LIBERMAN

Admitted and Filed in Evidence May 3, 1960.

PLAINTIFFS' EXHIBIT No. 6

This Agreement, made this 30th day of July, 1957 between Duke City Lumber Co., a partnership consisting of Maurice Liberman, Joseph Grevey, and Jack Grevey, of Albuquerque, New Mexico, hereinafter called "Duke City," and Arizona Timber Co. (formerly Winslow Timber Co.), a New Mexico corporation, hereinafter called "Arizona Timber,"

Witnesseth:

Whereas Duke City is the owner of the right to cut 62,505,000 feet log scale of timber pursuant to a certain timber cutting contract, dated May 21, 1956, between Duke City and Southwest Lumber

Plaintiffs' Exhibit No. 6—(Continued)

Mills, Inc., an Arizona corporation, said volume of timber being as indicated by the results of the joint cruise referred to in Section 6.1 of said contract and being located in Coconino County, Arizona, within the exterior boundaries of the Sitgreaves National Forest, said location being more particularly described as follows:

T.	R.	Sec.	Description	M.B.M. Volume
13N	12E	1	West of Wilkins Draw	105
13N	12E	3	East of Leonard Canyon	3,134
13N	12E	9	East of Leonard Canyon	2,553
13N	12E	11	West of Wilkins Draw	4,901
13N	12E	13	West of Wilkins Draw	1,096
13N	12E	15	All	5,713
13N	12E	17	Forty No. 16	281
13N	12E	21	All except inoperable area	4,651
13N	12E	23	All	7,177
13N	12E	25	Forty Nos. 4, 5, 12	1,269
13N	12E	27	Forty Nos. 9, 10, 15 and 16	1,466
13N	12E	33	All	7,159
13N	12E	35	All	7,056
14N	12E	23	East of Leonard Canyon	2,370
14N	12E	25	West of Wilkins Draw	5,253
14N	12E	27	East of Leonard Canyon	948
14N	12E	35	All	5,840
14N	13E	19	West of Wilkins Draw	1,533
				62,505

Plaintiffs' Exhibit No. 6—(Continued)

Whereas Arizona Timber is the owner of the right to cut the following timber:

I. 7,396,000 feet log scale of timber as follows:

A. 3,164,000 feet of timber purchased under a certain timber sale agreement dated May 21, 1956 between Arizona Timber and Aztec Land & Cattle Company, Limited, a New York corporation, said volume of timber being as indicated by the results of the joint cruise referred to in Section VI (1) of said timber sale agreement, and being located in Sitgreaves National Forest, Arizona, as follows:

T.	R.	Sec.	Description	M.B.M. Volume
13N	13E	11	Forty Nos. 10, 15, and 16	469
13N	13E	15	Forty Nos. 1 to 11 inclusive	2,695
				3,164

B. 4,232,000 feet log scale located on the following described land in Coconino County, Arizona.

T. 13 N., R. 13 E., G&SRM:	Acres
Sec. 27, Lots 1, 2, 3, W $\frac{1}{2}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$	606.76
Sec. 33, NW $\frac{1}{4}$ SE $\frac{1}{4}$	40.00
646.76	

Plaintiffs' Exhibit No. 6—(Continued)

II. 54,849,000 feet log scale, the cutting rights to which Arizona Timber acquired pursuant to a certain timber cutting contract dated May 1, 1957 with Bernalillo Lumber Co., a co-partnership consisting of A. I. Kaplan and T. P. Gallagher, hereinafter called "Bernalillo." The cutting rights to said timber were in turn acquired by Bernalillo as follows:

A. 23,249,000 feet log scale pursuant to a certain timber cutting contract, dated May 21, 1956 between Bernalillo and said Southwest Lumber Mills, Inc., said volume of timber being as indicated by the results of the joint cruise referred to in Section 6.1 of said contract and located in said National Forest as follows:

T.	R.	Sec.	Description	M.B.M. Volume
13N	13E	1	All except 70 acres for Ranger Station, and Winslow logging camp	2,979
13N	13E	3	All	3,210
13N	13E	5	East of Willow Creek	710
13N	13E	9	Forty Nos. 1, 2, 3 and East Half of Forty No. 4	679
13N	13E	11	All except Forty Nos. 10, 15 and 16	2,530
13N	13E	17	East of Willow Creek	889
13N	13E	29	S.W. Corner, West of Willow Creek	803

Plaintiffs' Exhibit No. 6—(Continued)

T.	R.	Sec.	Description	M.B.M. Volume
13N	13E	31	Forty Nos. 1, 2, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16 and east half Forty Nos. 5 and 12	5,523
14N	13E	21	All	2,094
14N	13E	29	All	2,137
14N	13E	31	East of Willow Creek	51
14N	13E	33	All	3,151
				24,756
Less timber cut prior to this exchange:				
13N	13E	29	671,690'	
13N	13E	31	835,580	1,507
				23,249

B. 31,600,000 feet log scale pursuant to a certain contract dated August 15, 1955 between Bernalillo (referred to in said contract as T. P. Gallagher & Associates) and United States Forest Service, said volume of timber being as estimated by the Forest Service, located in Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32 and 33, T. 12 N., R. 13 E.; Sections 24, 25 and 36, T. 12 N., R. 12 E.; Sections 5, 6, 7 and 18, T. 11 N., R. 13 E.; and Sec-

*The area of timber excluded for the Ranger Station and Winslow logging camp is not final. If the area is increased, the volume of timber excluded from the contract is to be reduced on the basis of the average volume per acre on the adjacent forties.

Plaintiffs' Exhibit No. 6—(Continued)

tions 1, 2, 11, 12 and 13, T. 11 N., R. 12 E., G. & S.R.B. & M., Promontory Unit, Sitgreaves National Forest, Arizona.

Whereas the parties desire to cut and mill their timber either jointly or by contracting with a third party to cut and mill it, and also desire to avoid the inconvenience of segregating the logs of the parties, and

Whereas it is the intention and desire of the parties to effect a tax-free exchange, on which no gain or loss will be recognized, pursuant to Section 1031 of the 1954 Code:

Now, Therefore, in consideration of the mutual promises herein contained, the parties agree as follows:

1. Arizona Timber exchanges one half of its rights to cut a total of 62,245,000 feet of timber, described above, for one half of the rights of Duke City to cut 62,245,000 feet of timber out of the tracts in which it has cutting rights, as described above.

2. Each party agrees to make all payments and meet all obligations with respect to the timber or timber cutting rights of which it was the owner prior to such exchange, as such payments and obligations become due.

DUKE CITY LUMBER CO.

/s/ M. LIBERMAN

ARIZONA TIMBER CO.

.....

Admitted and Filed in Evidence May 3, 1960.

PLAINTIFFS' EXHIBIT No. 9
Schedule "A"

AVAILABLE TIMBER AT DATE
OF SALE—NOVEMBER 6, 1958

Source	Net Log Scale	Net Lumber Recovery*
1. Duke City Aztec		
(a) To Be Cut Under Milling Contract	44,055,000	50,663,000
2. Gallagher Aztec		
(a) Uncut Under Existing Contracts	15,235,000	17,520,000
(b) Owed by Duke City....	18,450,000	21,217,000
3. Forest Service		
(a) Uncut Under Existing Contracts	18,852,000	21,680,000
(b) To Be Cut Under Future Contracts	135,205,000	155,485,000
		<u>266,565,000</u>

*Based on over-run of 15% on net log scale.

- 1 (a) 62,505,000 total per Pooling Agreement dated 7/30/57,
minus timber owed by Duke City, per 2(b).
- 2 (a) Admitted by Answer to Interrogatory No. 33.
- 2 (b) Agreed upon by Gallagher and Duke City.
- 3 (a) Admitted by Answer to Interrogatory No. 33.
- 3 (b) Contract to be awarded 5/31/60
and to be cut by 12/31/62—
net log scale and net lumber
recovery, respectively 26,800,000 30,820,000
Contracts thereafter to be awarded
and to be cut by 12/31/73, based on
net log scale of 10,500,000 per year
for years 1963 through 1968 and
9,081,000 per year for years 1969
through 1973 108,405,000 124,665,000

Admitted and Filed in Evidence May 5, 1960.

PLAINTIFFS' EXHIBIT No. 10

Schedule "B"

OPERATING PROFIT OF NAGEL MILL
BEFORE DEDUCTING DEPRECIATION

Year	Net Sales FBM	Amount	Average Per M
1952.....	11,575,000	\$ 228,849.12	\$19.771
1953.....	12,529,000	182,600.00	14.574
1954.....	12,261,000	162,510.04	13.254
1955.....	14,174,000	278,752.18	19.666
1956.....	19,313,000	229,918.69	11.904
1957.....	25,701,000	40,060.65	1.559
1958.....	22,648,000	242,238.34	10.695
1959.....	22,755,000	226,862.38	9.970
	<u>140,956,000</u>	<u>\$1,591,791.40</u>	
		Weighted Average	<u><u>\$ 11.29 Per M*</u></u>

*1,591,791.40 ÷ 140,956,000

Admitted and Filed in Evidence May 5, 1960.

PLAINTIFFS' EXHIBIT No. 11

DEPRECIATION SCHEDULE *

	<u>No Salvage Not To Be Replaced</u>	<u>15% Salvage</u>		<u>5% Salvage To Be Replaced</u>	<u>Non- Depreciable</u>	<u>Total</u>
		<u>Not to Be Replaced</u>	<u>To Be Replaced</u>			
Mill		\$ 176,970.00				\$ 176,970.00
Planing Mill		127,240.00				127,240.00
Shop		18,780.00				18,780.00
Lumber Shed		12,670.00				12,670.00
Log Kiln		56,470.00				56,470.00
Office Building and Equipment		1,740.00	\$ 1,740.00			3,480.00
Workhouse		4,540.00				4,540.00
Trailers and Lift Trucks				\$ 59,550.00		59,550.00
Stacking Sticks, Foundations,						
Boards and Roof Boards	\$ 80,000.00					80,000.00
Camp		5,000.00				5,000.00
Trucks, Trailers, Auto						
Patrols and Ford Pickup				97,500.00		97,500.00
Land					\$ 7,800.00	7,800.00
TOTALS	\$ 80,000.00	403,410.00	1,740.00	157,050.00	7,800.00	650,000.00
Salvage	00.00	60,511.50	261.00	7,852.50	7,800.00	76,425.00
Net Depreciable Balance	\$ 80,000.00	342,898.50	1,479.00	149,197.50	00.00	573,575.00
Two Replacements:						
At End of 3 Years			1,479.00	149,197.50		150,676.50
At End of 9 Years			1,479.00	149,197.50		<u>150,676.50</u>
Total Depreciable Investment						\$ 874,928.00

Depreciation spread Over Total Projected
Production of 266,565,000 Feet

\$ 3.23 per M

Based on Duke City Allocation of the
\$650,000.00 Purchase Price.

Admitted and Filed in Evidence May 5, 1960.



PLAINTIFFS' EXHIBIT No. 12

Schedule "D"

PROJECTED PROFIT FROM
AVAILABLE TIMBER

1. Duke City Aztec

\$ 3.00 per M. x 50,663,000	\$ 151,989.00
4.33 per M. x 50,663,000	219,370.80

2. Balance of available timber

*\$ 8.01 per M. x 215,902,000	1,729,375.02
Total Projected Profit.....	<u>\$2,100,734.82</u>
50% of Projected Profit.....	<u>\$1,050,367.41</u>

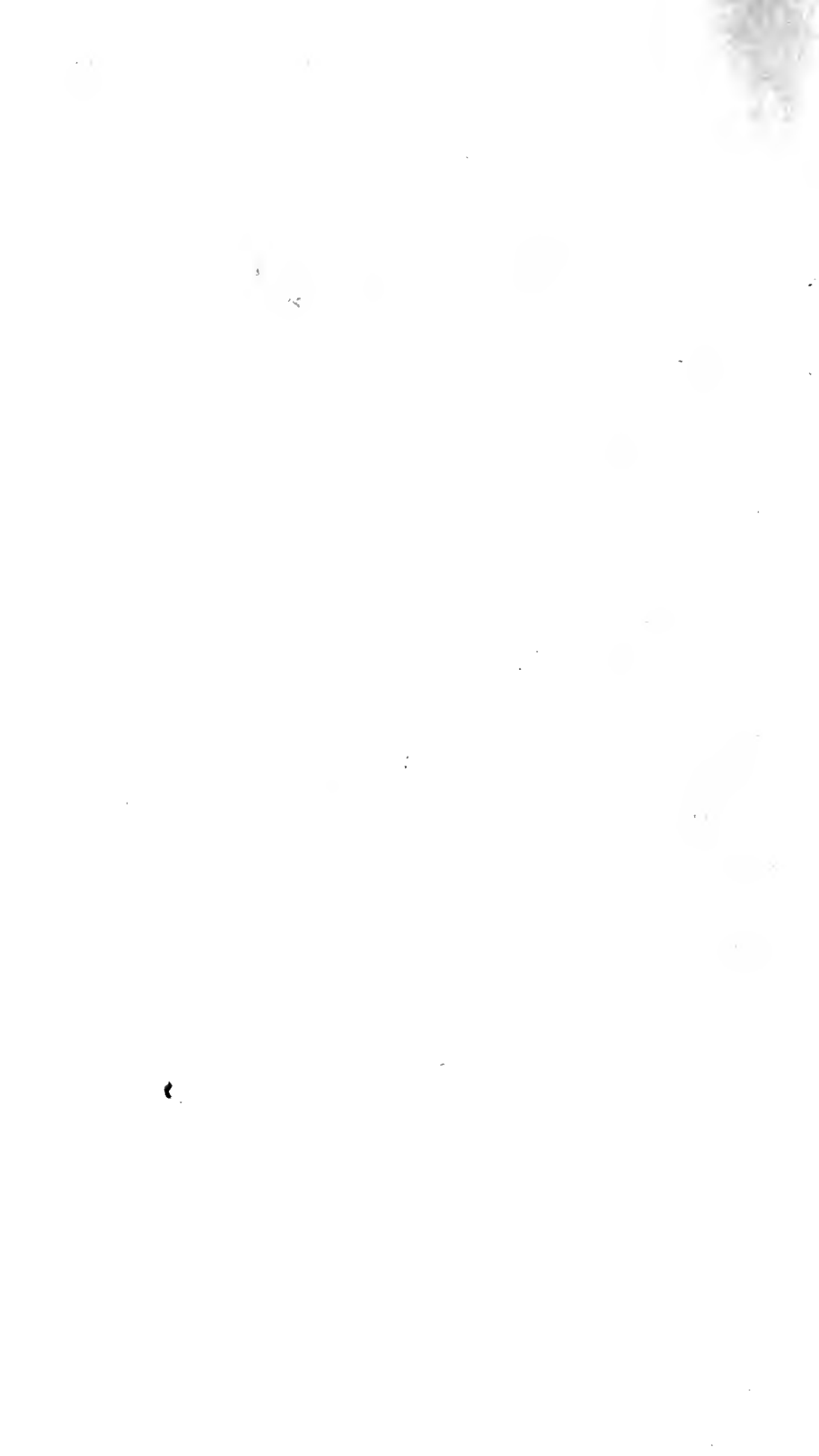
*Average Nagel Profit Before Depreciation.....\$ 11.29

Minus depreciation of \$874,928.00 spread over
total production of 266,565,000..... 3.28**

Projected Profit After Depreciation.....\$ 8.01 Per M.

**See Depreciation Schedule

Admitted and Filed in Evidence May 5, 1960.



PRODUCTION OF AVAILABLE
TIMBER BY YEARS

PLAINTIFFS' EXHIBIT No. 13

* 50% OF PROJ
PROFIT BY YI

1959	Duke City Aztec	15,320,000	\$ 56,147.80	
	Existing Forest Service	<u>14,680,000</u>	<u>58,793.40</u>	\$ 114
	30,000,000			
1960	Duke City Aztec	15,000,000	54,975.00	
	Existing Forest Service	7,000,000)	<u>60,075.00</u>	115
	Future Forest Service	<u>8,000,000)</u>		
	30,000,000			
1961	Duke City Aztec	15,000,000	54,975.00	
	Gallagher Aztec	4,830,000)	<u>60,075.00</u>	115
	Future Forest Service	<u>10,170,000)</u>		
	30,000,000			
1962	Duke City Aztec	5,343,000	19,582.10	
	Gallagher Aztec	12,007,000)	<u>98,751.29</u>	
	Future Forest Service	<u>12,650,000)</u>		118
	30,000,000			
1963	Gallagher Aztec	17,925,000		
	Future Forest Service	<u>12,075,000</u>		120,
	30,000,000			
1964	Gallagher Aztec	3,975,000		64,
	Future Forest Service	<u>12,075,000</u>		48,
	16,050,000			48,
1965	Future Forest Service	12,075,000		48,
1966	Future Forest Service	12,075,000		48,
1967	Future Forest Service	12,075,000		48,
1968	Future Forest Service	12,075,000		41,
1969	Future Forest Service	10,443,000		41,
1970	Future Forest Service	10,443,000		41,
1971	Future Forest Service	10,443,000		41,
1972	Future Forest Service	10,443,000		41,
1973	Future Forest Service	<u>10,443,000</u>		<u>41,</u>
		<u>266,565,000</u>		<u>\$ 1,050,</u>

EXISTING TIMBER - NET LUMBER RECOVERY

* Computed as

Duke City Aztec	Gallagher Aztec	Forest Service	Total
15,320,000	4,830,000	14,680,000	
15,000,000	12,007,000	7,000,000	
15,000,000	17,925,000		
<u>5,343,000</u>	<u>3,975,000</u>		
50,663,000	38,737,000	21,680,000	111,080,000

Duke Cit;

All other

** Computed fr
in 6 Arizor

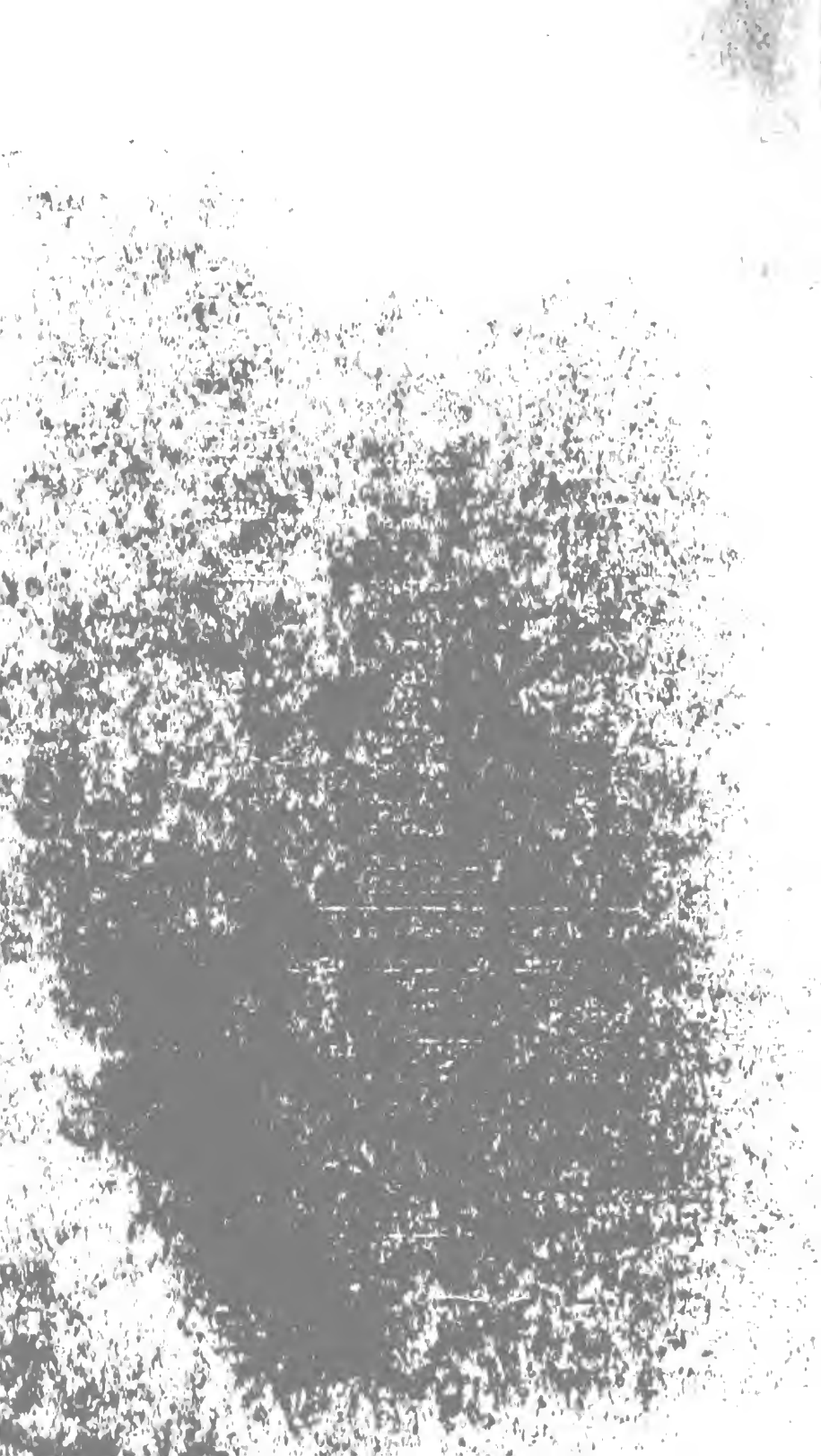
FUTURE TIMBER - NET LUMBER RECOVERY

Forest Service Contract to be awarded 5/31/60
and to be cut by 5/31/62 30,820,000

Admitt

Forest Service Contracts to be awarded
and to be cut in years 1963 to 1973
inclusive

<u>124,665,000</u>	<u>155,485,000</u>
TOTAL	<u>266,565,000</u>



PLAINTIFFS' EXHIBIT No. 17

In the District Court of the United States
for the District of Arizona

No. Civ. 610 Prescott

GEORGE H. NAGEL, MABEL J. NAGEL,
ROBERT T. JENKINS and GEORGIA MAE
JENKINS, general partners, and GEORGIA
MAE JENKINS, trustee for James Henry
Nagel, limited partner, doing business as Nagel
Lumber & Timber Company, a limited partner-
ship; and NAGEL LUMBER & TIMBER
COMPANY, a limited partnership,
Plaintiffs,

vs.

MAURICE LIBERMAN, JOSEPH GREVEY
and JACK GREVEY, co-partners doing busi-
ness as Duke City Lumber Company; and
DUKE CITY LUMBER COMPANY, a
partnership, Defendants.

DEPOSITION OF MAURICE LIBERMAN

The deposition of Maurice Liberman was taken as an adverse party deposition pursuant to oral stipulation, before E. W. Powers, Jr., a notary public in and for the County of Maricopa, State of Arizona, on the 5th day of December, 1959, commencing at the hour of 9:30 o'clock a.m., at the offices of Messrs. Jennings, Strouss, Salmon & Trask, Title & Trust Building, Phoenix, Arizona.

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

The plaintiffs were represented by their [1] attorneys, Messrs. Moore & Romley, by Mr. Elias M. Romley and Mr. Philip Robbins.

The defendants were represented by their attorneys, Messrs. Jennings, Strouss, Salmon & Trask, by Mr. Rex H. Moore.

The following proceedings were had:

Stipulation

It Was Stipulated by and between the parties to the above entitled cause that the deposition of Maurice Liberman may be taken as an adverse party deposition before E. W. Powers, Jr., a notary public in and for the County of Maricopa, State of Arizona, on the 5th day of December, 1959, commencing at the hour of 9:30 o'clock a.m., at the offices of Messrs. Jennings, Strouss, Salmon & Trask, Title & Trust Building, Phoenix, Arizona.

It was further stipulated that all objections except as to form of questions or answers and except as to errors which might be obviated or cured at the time of the taking of the deposition are reserved until the time of trial. All other formalities required by law for the taking and returning of depositions are waived, with the exception that deponent may sign said deposition once only at the end thereof. [2]

Maurice Liberman, being first duly sworn by the notary, testified as follows:

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

Cross Examination

Q. (By Mr. Romley): Will you state your full and true name, please?

A. Maurice Liberman.

Q. Where do you live, Mr. Liberman?

A. Albuquerque, New Mexico.

Q. How long have you lived in Albuquerque?

A. Since 1943.

Q. Where and when were you born?

A. I was born in 1908 in Poland.

Q. When did you come to the United States?

A. 1942.

Q. That was your first trip to America?

A. That's right.

Q. Have you lived in the United States ever since?

A. Yes, sir.

Q. Are you now a citizen of the United States?

A. Yes.

Q. When and where were you naturalized?

A. I was naturalized in Santa Fe in 1947.

Q. Where did you first reside on coming to [3] the United States?

A. New York.

Q. Where in New York?

A. New York City.

Q. Were you engaged in business there?

A. No.

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

Q. Were you engaged in business anywhere in the United States prior to moving to Albuquerque?

A. No.

Q. What was your business when you were in Europe? A. Lumber business.

Q. How long have you followed that business, Mr. Liberman? A. Thirty-three years.

Q. You have grown up in the business?

A. Yes, sir.

Q. When you say "lumber business," you mean in all phases of it, cutting and manufacturing, selling? A. Yes.

Q. Have you ever been engaged in any other business? A. No.

Q. What relation do you bear to the co-defendants, Joseph Grevey and Jack Grevey? [4]

A. Full brothers.

Q. Full brothers? A. Yes.

Q. How does it happen that they bear or use a different surname?

A. I would rather let them answer the question.

Q. Well, I am asking you, sir.

A. They have changed their name.

Q. They changed their name?

A. That's right.

Q. When? A. In '42.

Q. Where?

A. Joe changed his name in '42 in the Army.

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

Q. In which Army? A. U. S.

Q. Do you know of any court proceedings as a result of which he changed his name?

A. No.

Q. When did Jack Grevey change his name?

A. I don't know exactly the day.

Q. Do you know of any court proceedings by which he changed his name? A. No.

Q. Am I to understand from your statement here that they just assumed a different name? [5]

A. That's right.

Q. Their true name is Liberman, then, is that right? A. That's right.

Q. To your knowledge, have they ever gone by any name other than Liberman or Grevey?

A. No.

Q. Have you ever gone under any name other than Liberman? A. No.

Q. When did your brothers, Joe and Jack Grevey, or Liberman, their true name, come to America? A. In '42.

Q. The same time you did?

A. Joe came the same time I did, Jack came two or three months before.

Q. All three of you were born in Poland?

A. Yes.

Q. Are they younger brothers? A. Yes.

Q. How much younger than you?

A. Joe is two years younger, Jack is six.

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

Q. Were they engaged in the lumber business with you in Poland? A. Joe did. [6]

Q. Was Jack?

A. Jack was in college and he was with my oldest brother, textiles.

Q. In textiles? A. Yes.

Q. In what country were you engaged in the lumber business before coming to America?

A. France.

Q. Any other?

A. Oh, for business purposes, yes, in Germany, all countries of Eastern Europe, Africa.

Q. Were you engaged in the lumber business on what might be referred to or termed a large scale? A. Yes.

Q. As the owner or as an employee of the owner?

A. To start, as an employee, and then a junior partner.

Q. And in '42 when you came to America, in what capacity were you? A. Junior partner.

Q. Who were your partners at that time?

A. A man by the name of Rottenberg.

Q. What is his first name?

A. Sam, Samuel.

Q. Any other partners? A. No. [7]

Q. Is he still living? A. No.

Q. When did he die?

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

A. He died in '46 or '47, I don't know exactly.

Q. How did it happen you left Europe and came to America?

A. I left on account of the invasion of France by the Germans.

Q. Have you been back to Europe since?

A. Once.

Q. How long did you remain in New York?

A. About three months.

Q. Did you go directly from New York to New Mexico? A. Yes, sir.

Q. Albuquerque? A. McNary, Arizona.

Q. You came to Arizona before going to New Mexico, is that right? A. That's right.

Q. I assume that would be sometime in early '43, is that correct, sir?

A. It was in July or August of '43—excuse me, '42.

Q. How long did you remain in McNary? [8]

A. Oh, four or five months.

Q. Engage in business there?

A. I worked for Southwest Lumber Mills.

Q. During those four or five months?

A. Yes.

Q. In what capacity were you employed by Southwest Lumber Mills?

A. To start with, as a checker.

Q. And later?

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

A. Later as the manager of their Magdalena yard in New Mexico.

Q. Employed in any other capacities by Southwest? A. Yes, as a grader.

Q. Where?

A. McNary and Magdalena.

Q. And in any others?

A. No, that's about it.

Q. Why did you leave Southwest?

A. I had been transferred to Albuquerque where I started a new business.

Q. Where you started, you say—

A. I started Mr. McNary and Warren.

Q. C. J. Warren? A. That's right.

Q. You left Southwest Lumber Mills of your [9] own accord? A. That's right.

Q. You were not discharged? A. No, sir.

Q. Then you formed a partnership, did you, with McNary and Warren?

A. It wasn't a partnership, it was employed and interested.

Q. In what way were you interested?

A. In the profit, profit sharing.

Q. Who were the owners of the business?

A. The McNary family.

Q. In what capacity were you employed?

A. Manager.

Q. How long did you continue to be employed by the McNary family?

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

A. I would say from three to six months.

Q. All the time in Albuquerque?

A. Yes, sir.

Q. And after the three or six months what did you do?

A. I became interested as an operator.

Q. Went into business on your own?

A. No, we have changed the arrangement that we had with the McNary family.

Q. Tell me about that change, how it was [10] effected.

A. Well, I rented a plant from them and operated it on my own.

Q. As the owner and operator, you mean?

A. That's right.

Q. Were you the sole owner and operator at that time? A. Yes, sir.

Q. Under what name did you do business at that time? A. Transit Remanufacture.

Q. How long did you continue doing business as Transit Remanufacture?

A. Since '43 up today.

Q. You still operate that same firm?

A. Yes, sir.

Q. When did your brothers come into business with you at Albuquerque?

A. Joe came in—I can't recall exactly, but I would say in '44.

Q. And Jack?

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

A. Jack came, I would say, in '47. These are not exact dates.

Q. Have they been with you continuously?

A. Yes.

Q. What form does that operation take, the [11] Transit Remanufacturing Company? Is it a partnership or corporation? A. Corporation.

Q. Are you the majority stockholder?

A. Yes.

Q. What percentage of the outstanding shares do you own? A. Fifty-one per cent.

Q. Who are the other owners, and in what percentage?

A. Joe Grevey, 39; Jack Grevey, 10.

Q. Are there any other compaies in New Mexico in which you are engaged in the lumber business?

A. Yes.

Q. What are their names?

A. Duke City Lumber Company, Crown Wood Products, Jemez Mountain Lumber Company.

Q. Any others?

A. No, I don't think so, in New Mexico.

Q. Duke City Lumber Company is a partnership consisting of you and Joe and Jack, is that right? A. That's right.

Q. What is the percentage of ownership in that partnership? A. Same. [12]

Q. You mean you are equal partners?

A. No, sir, the same as the corporation.

Q. Fifty-one per cent, 39 and 10, is that right?

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

A. That's right.

Q. Now in the Crown, did you say?

A. Yes.

Q. What is the full name of that?

A. Crown Wood Products.

Q. Is that a corporation? A. Yes.

Q. Are you three the sole stockholders?

A. Yes, sir.

Q. In the same percentages? A. Yes.

Q. The third company you mentioned is Jemez?

A. Jemez.

Q. And its full name?

A. Jemez Lumber Company.

Q. Is that a corporation? A. Yes, sir.

Q. I take it this corporation and the Crown corporation are both New Mexico corporations, is that right? A. Yes, sir.

Q. I mean organized under the laws of the [13] State of New Mexico? A. Yes, sir.

Q. Are you three the sole stockholders of Jemez?

A. Yes, sir.

Q. In the same percentages? A. Yes, sir.

Q. There are no other corporations engaged in the lumber business in which you have any financial interest in New Mexico, is that a correct statement?

A. Yes.

Q. Now are you engaged in the lumber business in any states other than New Mexico and Arizona?

A. Yes, we have a corporation, I think, in Utah.

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

Q. When you say "I think," what do you mean by that, sir?

A. Because it has been organized not so long ago, and I'm not sure, I can't give you the full information.

Q. Tell me its name, please.

A. I don't remember even the name.

Q. You say "Organized not so long ago," how long ago, sir? A. Maybe 90 days.

Q. Who are the stockholders in that corporation? [14] A. The same stock.

Q. In the same percentages? A. Yes.

Q. In what part of Utah is it engaged in business? A. Salt Lake City.

Q. You know who organized the corporation there, what attorney? A. Yes.

Q. What is his name? A. Alvin Smith.

Q. Now are there any other states than the three we have mentioned, New Mexico, Arizona, and Utah, in which you are engaged or participate in engaging in the lumber business? A. That's it.

Q. Now in so far as Arizona is concerned, in what part of Arizona are you engaged in the lumber business? A. In Winslow, Arizona.

Q. That is all? A. Yes, sir.

Q. When did you first commence engaging in the lumber business in the Winslow area?

A. Would you explain to me the question in a more precise way? [15]

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

Q. In what respect, Mr. Liberman?

A. Do you mean in purchasing lumber or—

Q. Let me ask you, sir, perhaps I can shorten it by asking you this: you acquired some of the so-called Aztec lands in the Wallace Ranger Working Circle, did you not, near Winslow? A. Yes.

Q. When was that? A. That was in '56.

Q. About May or June? A. May, 1956.

Q. Was that your first participation in any way in the lumber business in Winslow? A. No.

Q. Where, and in what manner were you engaged in the lumber business in Winslow prior to May, 1956?

A. We had been buying rough green and surface lumber since, I would say, 1946.

Q. And transporting it from the Winslow area to New Mexico for final processing or manufacturing, is that what you mean, Mr. Liberman?

A. Yes.

Q. Were you engaged prior to 1956 in cutting timber yourself, or buying it after it was cut?

A. Both, I would say. [16]

Q. Did you have prior to 1956 any Forest Service permits or contracts that authorized you to cut lumber in the Winslow area? A. No.

Q. When did you first acquire such Forest Service permits or contracts?

A. I would like for you to be more specific.

Q. I mean in the Winslow area, of course.

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

A. Yes, but the timber that we had, Winslow was private timber that we bought, not forest.

Q. I'll ask you about that later, sir, I'm asking now about when you first acquired any Forest Service permits or contracts in the Winslow area.

A. You mean U.S. Forest Service?

Q. Yes.

A. We haven't any.

Q. Not to this date?

A. To this date, yes, we have.

Q. Well, when did you first get one?

A. In November, '56—excuse me—'58.

Q. As a result of the transaction that is the subject of this lawsuit, you mean? A. Yes.

Q. Until that time you had no Forest Service permits, U. S. Forest Service permits, in the [17] Winslow area, that's true, is it?

A. That's true.

Q. When did you first have any permits from private parties or contracts with private parties for timber in the Winslow area? You indicated awhile ago in a statement you made that you did have some.

A. Would you please specify what you mean by "Winslow area"?

Q. Well, there are—tell me what you, in your own language, what you mean by a "working circle"?

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

A. A working circle, as far as U. S. Forest Service is concerned, is a limited area of the U. S. Forest Service supplying timber to a specific mill.

Q. Now in Winslow, or near Winslow, I should say, there are two working circles that supply timber to the two plants in Winslow, that's true, isn't it? A. Yes.

Q. And that has been true for several years?

A. Yes.

Q. Those two are the Chevalon Working Circle and the Wallace Ranger Working Circle, is that right? A. Yes. [18]

Q. They lie to the south of Winslow?

A. Yes.

Q. They are divided substantially in half, so far as the timber is concerned? A. Yes, sir.

Q. By a roadway that runs north and south, relatively speaking, isn't that right?

A. Well, I'm not too familiar with the—

Q. Have you been there?

A. I have been there, yes.

Q. Is the Chevalon Working Circle, does it lie to the east of the road that runs north and south dividing these two working circles?

A. Mr. Romley, I'm not too familiar with the conditions up there.

Q. In any event, you do know that for several years there have been only two working circles that supply timber for the two existing mills in Winslow, that's true? A. Yes.

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

Q. And there is no other source of supply, to your knowledge, economically, that is to say, of timber for the two existing mills in Winslow other than Chevalon and the Wallace Ranger Working Circle, is that right?

A. And the Aztec timber. [19]

Q. And the Aztec timber. The Aztec timber we speak of is located in these two working circles, that's true, isn't it, interspersed here and there in alternate sections for the most part?

A. I can't answer the question, I'm not too familiar with the geographical conditions up there.

Q. Now I assume you would agree, Mr. Liberman, that a mill or plant engaged in the lumber business has and can have no value unless it is backed up by standing timber in one or another working circle, that's true, isn't it?

A. Would you please repeat the question?

Q. Is it correct to say this, Mr. Liberman, that a mill or a lumber plant is dependent, so far as its economic operation or profitable operation, upon having timber available at one or more of the working circles that supply timber to that plant?

A. Yes.

Q. So a plant without timber has no value, substantially speaking?

A. I don't agree with you.

Q. Well, it has greater value, that is a mill or a plant has greater value if it has standing timber

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

in a working circle to supply it, that is correct, isn't it [20] A. Yes.

Q. I suppose you would agree, too, sir, that the value of any given plant or lumber mill depends upon what the owner or operator of that mill or plant can make out of it in the manufacture and sale of lumber. Would you agree with that statement? A. Would you repeat it, sir?

Mr. Romley: Would you read it?

(The question was read.)

A. Yes.

Q. Now for the past several years there have been only two plants or mills—how do you prefer to designate these locations there in Winslow, sir, the one that you operate now as Duke City and where the Nagel Lumber & Timber operate, do you call that a mill or plant? A. A plant.

Q. All right, I will try to refer to it hereafter as a plant. And by "a plant," you mean the entire physical plant there in Winslow and the standing timber behind it in the forest, is that right?

A. No.

Q. What do you mean by "plant"?

A. By "plant," I mean the physical buildings, [21] equipment, and real estate of the plant.

Q. And that is all? A. That is all.

Q. Now when did you first engage in business with the Arizona Timber Company in the Winslow area?

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

A. After the fire in the Sitgreaves Forest occurred, I don't remember the date.

Q. Was that in about '56 or '57?

A. That's right.

Q. Shortly after you acquired some Aztec lands?

A. Aztec timber.

Q. Aztec timber, rather? A. Yes, sir.

Q. Perhaps we would be better if we keep this in its chronological order. You told us that you purchased some Aztec timber in May, 1956?

A. That's right.

Q. How much did you buy at that time, sir?

A. Over 60 million feet.

Q. Was it about sixty-three or four million feet?

A. That's right.

Q. Who did you purchase it from?

A. Southwest Lumber Mills. [22]

Q. You remember what you paid for it?

A. Yes, some at \$25 and some at 16.

Q. It was to average out somewhere in the neighborhood of \$19, wasn't it?

A. That's right.

Q. At that time you did not have a mill in which you could manufacture your timber in the Aztec lands, in the Aztec area there, is that right?

A. No.

Q. That is correct, isn't it?

A. That is correct, yes.

Plaintiffs' Exhibit No. 17—(Continued)

(Deposition of Maurice Liberman.)

Q. So after you acquired these 63 or 64 million feet of Aztec timber you looked around then to find a mill to manufacture your timber?

A. No, when I acquired the timber I had the right to establish two circular mills in the woods to mill it.

Q. Did you? A. No.

Q. Instead, you looked around to find an existing mill to manufacture your timber, is that right?

A. No, sir.

Q. You never did? A. No, sir. [23]

Q. We have got two negatives here, sir, and I want to find out exactly what your answer is. Are you telling me that you never attempted to get an existing mill to manufacture your Aztec timber?

A. The mills approached me to manufacture the timber for me.

Q. Which mills?

A. Arizona Timber Company and the Nagel Lumber Company.

Q. Who made the first approach?

A. Arizona Timber Company.

Q. And who were that company?

A. T. P. Gallagher.

Q. How long was it after you acquired the Aztec timber that this occurred?

A. It was even before the official writing of the contract, it was the end of 1955.

Plaintiffs' Exhibit No. 17—(Continued)
(Deposition of Maurice Liberman.)

Q. Did you make an agreement or contract at that time for the Arizona Timber Company to manufacture your Aztec timber if you should succeed in acquiring some?

A. We had been negotiating.

Q. Well, did you make a contract at that time?

A. No.

Q. When did you make a contract?

A. In 1957. [24]

Q. August the 9th? A. Yes, sir.

Q. So you started your negotiations with the Arizona Timber to manufacture your Aztec timber if you should acquire it even before you did acquire it?

A. Before we officially acquired it.

Q. It was only one time you acquired it, isn't it?

A. No, we have a written letter of committals.

Q. From Southwest? A. To Southwest.

Q. Do you remember the date?

A. Yes, I would say in January, '56, or February.

Q. I take it that is a written commitment on your part to buy sixty-three or four million feet, is that right? A. That's right.

Q. But that was not completed until some three months later in May?

A. It was subject to their acquiring the timber from Aztec.

Q. From Aztec. A. Yes.

